

# Email, Twitter and Facebook, Oh My!

## What should Human Resources Professionals know about monitoring and regulating employee conduct in this new age of social media websites?

By Scott A. Freedman



Technology should rightly be considered a double-edged sword for employers. On one hand, the internet provides an employer with a seemingly limitless amount of information regarding current and potential employees at his or her fingertips. On

the other hand, the enhanced ability of an employer to investigate an employee's background and conduct has created a legal minefield for employers: Should employers monitor or regulate employees' usage of the internet and social media websites? What sorts of policies can employers create to regulate time spent on the social media Web sites? All of these issues have come into the spotlight due to some recent potentially precedent-setting cases.

### What Can Employers Do to Regulate Employee Conduct During Non-working Hours and on Social Media Web sites?

In October 2006, Robert Half released a survey regarding employers' social networking policies. CIO's were asked, "Which of the following most closely describes your company's policy on visiting social networking sites, such as Facebook, MySpace and Twitter, while at work?" Fifty-four percent responded that that their policy completely prohibited such activity. Nineteen percent allowed access to those sites for business purposes only. Sixteen percent permitted access for limited personal use.

Ten percent permitted access for any type of personal use and one percent did not know if they had a policy. Earlier this year, Robert Half surveyed CIO's again, asking, "As social networking has become more of a business tool, how have you had to re-evaluate your IT policies surrounding its use by employees in your company?" Twenty-three percent stated they were now stricter with respect to employees' personal use of the internet, while ten percent were more lenient. Fifty-five percent responded that there was no change in their policy.

These two surveys illustrate how important it is for employers to create policies that address employees' use of social media. Before examining what employers can do to regulate employees' conduct on social medial Web sites, it is important to examine their ability to regulate employee conduct during non-working hours.

### 98.6 and 96(k)

California Labor Code sections 96(k) and 98.6 have caused some concern for California employers in recent years because they appear to place limits on the "at will" nature of employment. Section 98.6 states that "no person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96." Section 96(k) states that the California Labor Commissioner may assert "claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employers premises," on behalf of employees. These two sections appear to limit an employer's ability to terminate an employee for conduct occurring outside the workplace during non-working hours. However, two cases interpreting these sections serve to alleviate some of these concerns.

In *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4<sup>th</sup> 525, an employee was terminated for dating a subordinate. The employee sued alleging he was wrongfully terminated and his privacy rights and his rights under 96(k) were violated. The employee asserted that his relationship with his subordinate was lawful and conducted during non-working hours away from the workplace. The court summarily adjudicated the case, concluding that 96(k) did not actually provide employees with substantive rights. Instead, it merely established a procedure by which the Labor Commissioner could assert, on behalf of employees, recognized constitutional rights.

The court explained that 96(k) was not an original source of employee rights, but provided a supplemental procedure for asserting employee claims for which a legal basis already exists elsewhere in the law. Employees already could pursue wrongful termination claims based on Constitutional rights violations. Labor Code 96(k) simply allowed the Labor Commission to also act on behalf of employees to vindicate existing public policies. The court went on to say that in order to be successful, the employee would have had to assert recognized constitutional rights. Since he could not make this showing, his wrongful termination claim could not be established.

The court further examined 96(k) a year later in *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4<sup>th</sup> 72 when it considered a situation where an employee alleged was fired because of her membership in an investment group. The plaintiff alleged that her termination was a violation of her First Amendment rights under the U.S. Constitution and a violation of her rights under 96(k) and 98.6. The court reasoned that

a common law cause of action like wrongful termination "cannot be broader than the...statute on which it depends." *Id.* at 86. Therefore, the plaintiff must allege that the termination occurred because he or she asserted are recognized constitutional right.

Unfortunately, for the employee in *Grinzi*, the complaint only alleged her rights under the First Amendment of the U.S. Constitution. The First Amendment only prevents the government from interfering with an individual's free speech rights but says nothing about private employers' interference with free speech rights. Since the employer was a private employer, the court found that Grinzi was not terminated for exercising a recognized constitutional right as described in 96(k). The court stated that neither section 96(k) nor section 98.6 supported a public policy against a private employer's termination of an employee for lawful conduct otherwise unprotected by the Labor code during non-working hours and off the employer's premises. The court avoided having to consider whether a private employer can be liable for wrongful discharge based on the California Constitution's free speech guarantee.

While the *Barbee* and *Grinzi* opinions provided some relief to private employers, it is still important for employers to remain cautious when disciplining employees for lawful conduct outside of work. If that conduct is protected by the Labor Code or even the California Constitution it could still potentially subject employers to liability. An example of this is the recent decision of the National Labor Relations Board to champion an employee who was discharged for criticizing her supervisor on Facebook.

#### Facebook case

In November 2010, the National Labor Relations Board issued an unfair labor practice complaint against American Medical Response of Connecticut alleging that a fired employee's Facebook comments were protected free speech under federal labor laws. The employer asked medical technician Dawnmarie Souza to prepare an investigative report after several patients complained about her work. Ms. Souza was upset by this and posted on her Facebook page, "Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor." The "17" is the company's code for a psychiatric patient. Other co-workers responded to her original post and in subsequent posts, Ms. Souza called her supervisor two explicatives. Ms. Souza was fired soon after the Facebook post.

The National Labor Relations Board's Complaint alleges that American Medical Response violated section 8(a)(1) of the National Labor Relations Act which states that employers may not "interfere with, restrain, or coerce employees in the exercise of" certain protected rights. These rights include the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." N.L.R.A. § 7. The NLRB investigated and found that Ms. Souza's Facebook postings constituted protected activity. According to the NLRB's Acting General Counsel, Lafe Solomon,

Ms. Souza's Facebook postings were the equivalent of "water cooler" discussions. Mr. Solomon further observed that employees have the right to talk to each other about conditions at work. He further stated that while this is a case of first impression, he expects similar issues in the future.

The NLRB also found that the company's blogging and internet posting policy contained illegal provisions that prohibited employees from making disparaging remarks when discussing the company or supervisors and that prohibited employees from depicting the company in any way over the internet without company permission. The NLRB felt that such policies had a "chilling effect" on employees' rights to engage in protected concerted activity such as Ms. Souza's. The NLRB hearing on this case will be later this month.

In a previous opinion, the NLRB provided guidelines regarding what sorts of policies have a "chilling effect" on protected activity. The NLRB will consider four things in order to determine if there is a "chilling effect": (1) whether the policy explicitly restricts protected activity; (2) whether, from the context of the policy, employees would reasonable construe the policy as prohibiting protected activity; (3) whether the policy has been used to discipline employees who have engaged in protected activity; and (4) whether the policy was promulgated in response to concerted or protected activity. Employers would be wise to heed these guidelines in formulating their own social media policies.

#### Conclusion

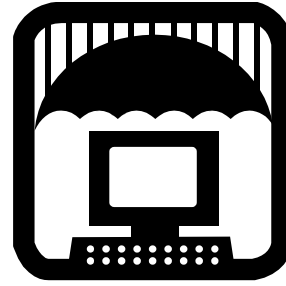
As this is a newly emerging field of law, there are no current appellate cases on record to determine the full parameters for employers to use in revising their rules and procedures affecting the use of social media by their employees. As these Facebook cases have recently been filed in the trial courts, it may take several years for them to reach the appellate courts whereby case law will be determined. Until then, and in light of the recent class action lawsuits and the NLRB case, employers would be wise to review their employee handbook and policies regarding employees' use of social media at work and during non-working hours. Employers also need to ensure their social media policies do not have a chilling effect on employee rights.



# Social Media

## Handbook Suggestions

By Scott A. Freedman



Under Computer and E-Mail Policy:

Any correspondence via Company's fax, E-mail or any other electronic devices is reserved for the conduct of the Company's business and prohibited for personal use. All information transmitted via and stored in the Company's electronic equipment, such as but not limited to, E-mail and faxes are the property of the Company.

Additional areas to include are company issuance of cellphones, PDA's, personal digital assistants such as Blackberries, Pagers, and computers provided for home use. Be sure to include the Company's right to inspect such devices at any time. Most companies already have in place computer and email policies in which the company retains the right to inspect the computer and E-mails at any time, but be sure to update the new communication devices and social media.

Also, be sure to include computer, cell phone, texting and other PDA uses in the office which may be disruptive or offensive to others, such as sexually explicit images, or racial epithets. This is to be included in your harassment section as well.

Be sure to include language in which an employee does not have any right of privacy in any company equipment, including computer use, E-mail, texts, at the office or away from the office, and reiterate all such items remain the property of the Company, and as such may be reviewed at any time.

Insert language in your handbooks that employees may not disseminate on any social media such as Facebook or any blogs in which the employee discloses trade secrets, or any company proprietary information, and that any such conduct would be grounds for immediate termination.

Under Your Company's Harassment Policies:

Include information that listed acts of sexual harassment may also include any harassment of one employee to another that is posted on any social media, such as web-chats, Facebook, Twittering or Blogs.

Additionally be sure to list in your supervisor training manuals that their behavior remains legally actionable beyond just the office itself. Just as their behavior out of the office which could be deemed sexual harassment or discriminatory could be actionable, so does any of their behavior that is posted on any social media, such as Facebook, Blogs and web-chats. Be very careful in friending a subordinate and you may want to have specific policies preventing such actions. Update your supervisor training to include social media potential problems.

Scott A. Freedman has an extensive background in litigation, primarily in the areas of employment law. Scott specializes in labor and employment law and has an extensive background handling cases dealing with discrimination because of gender, race, age, sexual orientation, disability, pregnancy and sexual harassment. Additionally, Scott handles all type of wage and hour claims including overtime, break issues, and labor code violations. Scott has also defended through trial diverse companies including retailers Wal-Mart Stores and Macy's, as well as security companies, hospitals, law firms and manufacturers. Scott also has extensive trial experience with over 35 jury trials. He has been a member of the American Board of Trial Advocates since 1995.

Morris Polich & Purdy LLP is a law firm that works with its clients on a national basis. MP represents clients in every state, as well as many U.S. possessions. The firm also has a wealth of international affiliations. Dedication to clients, combined with extensive experience, both in the trial and appellate courts, are the qualities that distinguish MPP from other law firms. The firm's attorneys are known for their vast experience and success. MPP provides superior legal services in a manner consistent with their clients' best interests and goals. The firm is committed to expertise in all their areas of practice, knowing their clients' businesses and providing client service at its highest level.

# EMAIL AND TWITTER AND FACEBOOK, OH MY!

## THE IMPACT OF SOCIAL MEDIA ON EMPLOYMENT PRACTICES

### COMPLIMENTARY SEMINAR

In this complimentary seminar, we will discuss the do's and don'ts in the ever-changing world of social media technology in order to avoid legal issues. A recent case filed in Connecticut, in which a woman was terminated after posting critical remarks about her supervisor on Facebook, may be precedent-setting, as this is the first case in this evolving area. As more cases of this type inevitably arise, it will become increasingly important for employers, managers and attorneys to understand how developments in social media can affect employment law. This seminar covers the following topics:

- Employer's use of social media such as Facebook and Google for pre-employment investigation
- The types of investigation allowed for pre-employment, and authorizations needed
- Employer's use of social media post-employment – what actions an employer can take if objectionable material is found on blogs or Facebook
- The use of employee's email and what an employer is allowed to search
- Policies an employer may have regarding off-duty conduct
- Updating of employee handbooks to cover such conduct and possible harassment concerns
- Employee policies dictating how supervisors interact with subordinates online, as well as via text and email

**Presented by:** Scott A. Freedman, Esq.  
Morris Polich & Purdy LLP

**Audience:** This seminar provides an insight that is ideal for senior management in all types of businesses, as well as attorneys.

**Details:** Wednesday, January 26, 2011

MPP's Los Angeles Office  
1055 West 7<sup>th</sup> Street, 24<sup>th</sup> Floor  
Los Angeles, CA 90017

Registration/Lunch: Noon – 1:00PM

Seminar: 1:00PM – 2:30PM

Business Card Draw for chance to win one of three 4GB Flash Drives: 2:30PM

**RSVP:** Jessie Asfahan at 213.417.5113 or [jasfahan@mpplaw.com](mailto:jasfahan@mpplaw.com)  
Please RSVP by Monday, January 24th



\*This seminar is hosted by Morris Polich & Purdy LLP, and will be provided free of charge to all attendees. A complimentary catered lunch will be provided. **This seminar has been approved for MCLE credit.**



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