"delete that tweet or you're fired!"

SHOULD YOU TERMINATE BECAUSE OF AN EMPLOYEE'S SOCIAL MEDIA?

by Geoffrey W. Washington, Esq., and Christine R. Hogan

Employers, think before using an employee's disparagement of you or your company on social media as a cause for termination. Legal implications may limit the power to terminate employees in such instances.

While private sector employees are not entitled to the same First Amendment protections as public employees, any employee eligible to organize a union may seek protection under the National Labor Relations Act, which protects "Concerted Activity."

Concerted activity includes any activity an employee engages in with other employees (or on the authority of other employees), as opposed to actions taken solely by the employee acting independently. Discussions between employees about work-related issues may be protected, even if they occur through social media outside of the workplace.

Recently, the National Labor Relations Board has begun investigating employee complaints following termination for social media comments. In one case, a disgruntled employee was terminated after posting an expletive-filled tirade against her employer on Facebook in response to a customer's complaint, and her remarks received positive comments from her co-workers. The former employee claimed that her comments were protected under the act and that the termination was improper. Ultimately, she received a financial settlement from the employer.

In addition to reinstatement, under the act, terminated employees may be entitled to recover damages for lost earnings and health benefits resulting from termination. While there is a fine line between disloyalty and protected activity, the boundary is not well-defined. Relevant factors for consideration include whether the employee was engaging in discussions with fellow employees, whether any coworkers responded to any social media postings, whether the employee sought to induce or prepare for group action (more than mere gripes or complaints), and whether the activity was an outgrowth of the collective concerns of multiple employees.

This year, Maryland was the first state to ban employers from requiring employees and job applicants to disclose their social media usernames and passwords as a condition of employment. New Jersey and other jurisdictions have upheld jury verdicts awarding monetary compensation for lost income and even punitive damages to employees who claimed to have been pressured to disclose such information.

Overall, companies should have well-thought-out policies and procedures tailored to address their employees' use of social media. Generic policies prohibiting employees from making "disparaging remarks" about their employer without permission are too broad and difficult to enforce. Similarly, policies prohibiting the use of inappropriate or offensive language may be unlawful, unless limited to allow protected activity.

Social media provides an inexpensive and quick mode of communication for individuals and organizations, but it also presents challenges to employers. As such, employers should proceed cautiously before disciplining employees for their social media activities.

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