Arbitrating Social Media Grievances

by Patrick R. Westerkamp and Rebecca Esmi

For more than 15 years, labor arbitrators have grappled with grievances[1] involving allegations of Internet misuse and abuse by employees who are represented by unions. These private judges have ruled on assertions that included inattention to duty; theft of time; visiting pornographic or gambling websites; coworker harassment; and inappropriate customer contact. Their resulting awards have applied the "common law of the shop" to workplace Internet use.[2] With the advent of social media websites, new issues have emerged. This article offers a glimpse into the future of arbitration in this realm. It is meant as a guide for attorneys, labor leaders, managers, and neutrals who will deal with social media grievances.

Overview

It should come as no surprise that the blockbuster movie "*The Social Network*" enthralled audiences with dramatic insights into the virtual communities facilitated by social media. This new form of communication differs from first-generation websites,[3] which deliver static content. Social media opens dialogues between users, and facilitates alliances among people no matter where they reside.

Wikipedia is the grandparent of today's social media superstars. This free online encyclopedia is publicly available, and may be edited by its users in more than 25 different languages, including Ido.[4] Facebook, Twitter, LinkedIn, MySpace, and Google's Orkut (preferred in some European and Asian nations) followed closely on its heels. These sites permit users to gather in affinity groups,[5] as well as to access and share real-time information with others.

Not surprisingly, social media websites are increasingly impacting the workplace. Employers, for example, have turned to them for applicant screening. College photographs, unguarded comments, and even applicants' emoticons (*e.g.*, ☺), have been weighed by prospective employers. According to one survey, 45 percent of participating employers visited social networking sites to check-on job applicants. For every such candidate who was hired, two were rejected owing to information on their sites. While not the subject of this article, it merits mention that drawing on the Internet to gather data about job applicants has distinct perils (*e.g.*, the Stored Communications Act,[6] Genetic Information Nondiscrimination Act of 2008,[7] and Fair Credit Reporting Act[8]).[9]

Meanwhile, it is reported, 77 percent of workers with Facebook accounts access them while on the job.[10] Conversations that once took "place near the water cooler have shifted to the Internet [where]…employees are using platforms like Twitter and Facebook to vent frustrations about their jobs."[11] This evolving communication forum is reverberating throughout shops and offices, including law firms. Consider the Florida practitioner who was reprimanded after blogging about what he perceived as the unfairness of one jurist's "speedy trial" procedure.[12]

On the advice of their employment counsel, corporations and agencies are crafting policies regulating employee social media use. Implementation and administration of these policies touch free speech, privacy, labor contracts, proprietary and customer information, statutory protections, and when employees are authorized to speak for the company.

A recent Proofpoint survey reveals, "10% [of major employers] have disciplined their ranks for running afoul of the [social media] rules."[13] Those who have been fired for these activities even have a new word to describe this unhappy event. The Urban Dictionary defines "dooced" as "losing one's job because of one's website."[14]

By way of example, medical technician Dawnmarie Souza posted Facebook comments criticizing her supervisor's role in the investigation of a client complaint.[15] In addition to some profane terms, she branded the supervisor a "Section 17"; workplace slang for a mental case. Management premised her resulting discharge, in part, on its contention that Souza violated company policy forbidding employees from portraying the organization on social media sites. The policy also prohibited

employees from disparaging either the company, or its officers and leaders. Souza, a union steward, asserted that she was within her free speech rights as a labor representative, and contended the supervisor committed multiple unfair labor practices.

The National Labor Relations Board (NLRB), which has its own Facebook page,[16] subsequently issued an unfair practice complaint alleging employer interference with Souza's statutory right to engage in "concerted activities."[17] The matter was settled on the eve of a scheduled hearing, when the employer, *inter alia*, agreed not to improperly restrict off-duty employees from discussing wages, hours and working conditions.

Grievance Arbitration

Recent discipline and discharge decisions by labor arbitrators likewise weigh allegations of social media abuse. In these matters, arbitrators apply traditional just cause analysis to determine if management—after conducting a full and fair investigation—proved that a grievant violated its reasonable rules. If so, the arbitrators next examine whether the level of discipline was in line with the severity of the offense, and with past treatment of similarly situated bargaining unit members.[18] Before upholding discipline, most arbitrators "require clear and convincing evidence both that the act took place and the actor was responsible for it."[19]

A Few Examples

One such grievance arbitration was filed on behalf of a teachers' assistant.[20] The issue was whether his social media postings constituted just cause for discharge. The grievant worked with 7th and 8th graders.

Relying on a friend's technical aid, he opened a Facebook page that was accessible by the general public. The grievant's initial entries identified him as a *teacher* in "X" public school district. Subsequent postings, including those from friends contained vulgarity, sexual references, and a venereal disease video parody.

A parent who was surfing the web found the site. Her complaint to school officials eventually escalated into unflattering press coverage. The grievant was promptly discharged on the ground that the site's "graphic content…constituted conduct unbecoming an educator working with middle school children."[21] The union grieved, and the case went to hearing. The arbitrator held that while the grievant's conduct was professionally inappropriate, he would never-the-less be reinstated with a three-day suspension. One can imagine school authorities wondering what happened.

In large measure, the arbitral decision turned on a finding that the grievant negligently, rather than intentionally, allowed public access to his site. Credence was given to the grievant's remorseful testimony that he relied on his friend to establish the site, and believed access was restricted to invited guests.[22] Also, the arbitrator was mindful of the absence of a social media policy in the school district. This omission, he noted, was serious since "the elements of just cause [require]…that the employee be aware of the rule or expectation with which he allegedly failed to comply."[23] In a similar case, a grievant was held responsible for not preventing an estranged wife from posting nude photos of him.[24]

A second illustrative case concerns a grievance filed by two university security officers.[25] Each received minor discipline for posting personal photos and commentary on their "Facebook like" sites. From the institution's vantage, the postings placed the college in a bad light. For example, Officer A's site pictured him at work with his feet casually resting on a desk. Meanwhile, Officer B touted his interest in female relationships on a webpage picturing him next to a campus police cruiser.

The university argued the postings violated school policy, and rose to the level of "conduct unbecoming." In turn, the union challenged the employer's proofs, and emphasized that the general public could not access the two websites. Additionally, the union noted that senior officers had engaged in similar activities without reprimand.

Although finding many of the university's proofs were flawed, the arbitrator held the school had just cause to discipline both men. He concluded that credible evidence supported that the officers had engaged in conduct unbecoming. The arbitrator wrote: "As public safety officers they should be held to a higher standard…[and] refrain from personal conduct that may reflect improperly on functions they are expected to support."[26] In this respect, he observed that a security department manual gave the officers sufficient notice of what constituted "conduct unbecoming."[27]

Finally, another case examined the discharge of a grievant who blogged on his MySpace website that the plant's German manager was a "green card terminator" who was a reincarnation of Adolf Hitler.[28] Although the postings were written at home, on the employee's personal computer, the arbitrator found a nexus between them and the workplace. Denying reinstatement, he wrote:

> The evidence suggests that Grievant not only knew that the discriminatory [*i.e.*, aimed at the manager's national origin] and disparaging words he posted on his blog would be read by many employees, but it also showed that he intended his blog to receive maximum publicity. In his post-discharge blogs, he continued to disparage management, thus showing no remorse for his transgressions and no understanding of how he violated Company rules or policies. His behavior amounted to gross misconduct by any measure.[29]

The arbitrator also disposed of the union's argument that the grievant's act were not punishable since they took place away from company property. He wrote, "many courts have recognized that even 'off-duty' conduct of an employee can create a hostile environment sufficient to establish a claim of harassment."[30] Indeed, he observed that employers' legitimate business interests are inherently connected to work rules prohibiting harassing conduct.[31]

Some Conclusions

What deductions may be drawn from the foregoing?

First, employers are apprehensive about the 'brave new world' of social media.

While public relations and marketing managers are harnessing social media to build the business, their counterparts in operations are anxious about harm that could result from employees accessing these same tools. They fret over workers wasting time, and misusing company computers by using social media for personal purposes. They fear too that ill-considered comments may magnify conflicts among workers, negatively affect morale, harm productivity, and create liability for failing to control harassing communications, or for "republishing" defamatory material.[32] Other worries include disclosure of proprietary assets such as trade secrets,[33] product disparagement, and/or insults to customers.

Depending on the industry and the players, such perceptions have a greater or lesser basis in reality. Whatever the merit of each concern, employers would do well to consider steps that are in proportion to the actual risk level. As with many labor relations issues, the secret lies in reasonable rules, which are even-handedly applied by trained supervisors. In turn, union representatives would do well to acknowledge legitimate employer apprehensions when negotiating terms and conditions for collective contracts, and when pursing grievances.

Grievance mediation may be a particularly apt alternative dispute resolution procedure for 'hot' social media grievances. Unlike arbitration, where there are winners and losers, grievance mediation permits parties to focus on interest-based problem solving. It permits the parties to craft a mutually acceptable resolution that often includes creative options, which are not available as remedies in arbitration.

Second, public attitudes toward privacy are changing as social media facilitate information sharing. People with Facebook pages project a uniform image to family, friends, coworkers, future employers, and gawkers alike. Rather than social media leading others to the invasion of our privacy, the danger lies in our continuing to "willingly, [and] compulsively violate our own privacy."[34]

In any instance, once posted social media communications become public information for which page 'owners' are responsible and accountable. Since posted materials are available to virtually everyone on the Internet, the publisher's comments are magnified. Unlike snide remarks whispered to colleagues gathered around the water cooler, regrettable comments can become 'viral' when broadcast on the web. Postings perpetually live in the ether awaiting future discovery, as shown by a pizza parlor employee fired for complaining on Facebook about two customers.[35]

The teacher assistant case clearly illustrates these realities. Despite the grievant's assumption that only 'friends' could access his Facebook page, a vigilant parent discovered its content. News of the racy postings spread throughout the school district, and his site soon had a slew of visitors including members of the press. As 'owner' of the content (information), the grievant was found responsible for his negligent behavior. He escaped with a three-day suspension only because of the interaction of mitigating circumstances.[36]

Third, social media sites that commingle personal information with data about an employer create links with the workplace that may lead to discipline, or even discharge. Uncensored personal thoughts may subject an organization to ridicule, result in decreased revenue, and/or cause discord among the workforce. This principle is aptly demonstrated by the resolution of Officer B's grievance. The arbitrator took him to task for posting the campus cruiser photo on the same page where he expressed interest in the opposite sex. While the arbitrator refused to speculate about "all of the possible ramifications such a statement could carry in connection with the performance of his official duties and how it may be interpreted by those reading it. The point is that it was simply inappropriate for Officer B to have interconnected both his personal life interests and his professional duties in such a manner."[37]

Fourth, employers with well-written, comprehensive policies governing the nexus between social media and the workplace are more likely to prevail in discipline and discharge grievance arbitrations. Indeed, as the United States Supreme Court recently observed, "employer policies concerning communications...shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."[38]

Labor arbitrators have long noted that "just cause" requires proof of a reasonable rule that has been effectively published to workers who are expected to comply.[39] Such guidelines as they relate to represented workers are frequently mandatory subjects of collective negotiations.[40] However, even when these rules fall within what the law calls 'permissive' subjects of negotiation, discussions with labor representatives often go a long way toward crafting a comprehensive policy, and avoiding subsequent challenges.

Among other topics, social media rules might address: what constitutes disparagement of clients, product, and person-

nel; not disclosing confidential business/customer information; and the dos and don'ts of on-the-job access to social media. Such rules must be understandable to, and understood by, all concerned. These cautions especially apply to managers and supervisors responsible for their enforcement.

Fifth, as with most discharge/discipline grievances, social media cases are fact specific and require significant preparation prior to a hearing. Advocates will do well to educate themselves on the technological characteristics of social media, anticipate issues that might arise, and be prepared to educate labor arbitrators about this revolutionary tool that is powerfully impacting society. ⚖

Endnotes

1. Labor/management conflicts over the interpretation or administration of collective bargaining agreements.
2. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).
3. They are premised on a "Web 2.0 philosophy," aimed at democratizing the Internet, while increasing its utility and profit potential.
4. Ido is a consciously created International Auxiliary Language, created with the goal of becoming a universal second language for speakers of different linguistic backgrounds as a language easier to learn than ethnic languages.
5. Merriam-Webster.com, www.merriam-webster.com/dictionary/affinity+group (Webster notes the term "affinity group" was first used in 1970, and describes a group of people united in a shared interest, goal, or purpose).
6. 18 U.S.C. § 2701.
7. Pub. L. 110-233, 122 Stat. 881, enacted May 21, 2008.
8. 15 U.S.C. § 1681 *et seq*.
9. *See* All Atwitter About Social Networking; Issues and Implications in Employment Dispute Resolution, AAA Neutrals Conference (2010). www.aaauonline.org/search.aspx?section=0&searchTerms=atwitter
10. Sharon Gaudin, *Study: Facebook Use Cuts Productivity at Work*, computerworld.com (July 22, 2009), www.computerworld.com/s/article/9135795/Study_Facebook_use_cuts_productivity_at_work.
11. Time For an Upgrade? Labor Rights Fall Short In Facebook Firing, www.google.com/search?hl=en&client=safari&rls=en&q=%22near+the+water+cooler+have+shifted+to+the+Internet%22&btnG=Search&aq=f&aqi=&aql=&oq=
12. Seduced for Lawyers; The Appeal of Social Media www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly
13. Proofpoint Social Media Statistics in Forbes: How Facebook Ruined my Career, www.forbes.com/2010/04/13/how-facebook-ruined-my-career-entrepreneurs-human-resources-facebook.html.
14. Urban Dictionary: Dooced www.urbandictionary.com/define.php?term=dooced
15. The postings were initiated away from the job, and on her personal computer.
16. National Labor Relations Board is on Facebook, Facebook.com, www.facebook.com/NLRBpage.
17. www.nlrb.gov/news/settlement-reached-case-involving-discharge-facebook-comments.
18. A minority of labor arbitrators also compare a grievant's discipline to an employer's treatment of non-represented employees, supervisors, and managers who have violated the identical rule.
19. *American Steel Foundries*, 94 Lab. Arb. 745, 748 (Seidman, Arb. 1990).
20. 2008 AAA Lexis 153 (March 24, 2008) (James Collins, Arb.).
21. *Id*. at 10.
22. A person accepted into a Facebook user's online community. 'Friends' may be mere acquaintances, or even strangers.
23. *Id*. at 21.
24. 24 Lab. Arb. 532 (2007) (Thomas Skulina, Arb.).
25. 2008 AAA Lexis 889 (Jan. 10, 2008) (Jay Seigel, Arb.).
26. *Id*. at 17.
27. *Id*. at 17.
28. 128 Lab. Arb. 37, 38 (2010) (Baroni, Barry Arb.).
29. *Id*. at 43.
30. *Id*. at 40.
31. *Id*. at 44.
32. *Companies Still Concerned…*, *supra* Note 1. *See* Deloitte, LLP, *Social Networking and Reputational Risk in the Workplace: 2009 Ethics & Workplace Survey* (2009), www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf. Note Deloitte's 2010 survey affirms the continued divergence of management and employee perspectives. Deloitte, LLP, *Trust in the workplace: 2010 Ethics & Workplace Survey* 20 (2010), www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2010_Ethics_and_Workplace_Survey_report_071910.pdf.
33. *Id*.
34. Only Connect, *Time* magazine, Vol. 176, No. 26/2010, page 64.
35. www.charlotteobserver.com/2010/05/17/1440447/facebook-post-costs-waitress-her.html.
36. 2008 AAA Lexis 153, 21-23 (March 24, 2008) (James Collins, Arb.).
37. 2008 AAA Lexis 889, 11 (January 10, 2008) (Jay Seigel, Arb.).
38. *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ___ (2010).
39. *See How Arbitration Works*, Elkouri & Elkouri, 4th Ed, (Bureau of National

Affairs, Washington, D. C.) Chapter 15, pp. 650-654.

40. Employers and the employee representatives are required by federal law to bargain over "wages, hours, and other terms and conditions of employment." These are called the mandatory bargaining subjects. 29 U.S.C. § 7.

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