SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

Employment Law Letter

FALL 2010

in this issue

Labor & Employment Law Department

www.shipmangoodwin.com

Badmouthing the Boss on Facebook

The internet has impacted the workplace in many ways, ranging from employers screening job applicants to employees using company computer systems for shopping or entertainment during work time. The latest set of issues revolves around employee use of social media to criticize their company or badmouth their boss. Because people seem increasingly uninhibited when expressing themselves on the internet, the problem seems to be growing exponentially.

The latest such case in Connecticut involves an employee of American Medical Response who reportedly called her supervisor a "dick" in one Facebook posting and a "scumbag" in another. AMR fired her for various offenses, apparently including her internet rants. Like many employers, AMR has a clear written policy prohibiting employees from criticizing the company or management personnel on the internet, or identifying themselves as associated with AMR when expressing controversial views. It might therefore seem like the employer's action was a no-brainer.

However, the NLRB didn't think so. The employee belonged to a union, and posted her comments after her supervisor denied her union representation in a situation where she thought she was entitled to it. The Board's regional office in Hartford issued a formal complaint, claiming the employee's firing constituted retaliation for engaging in "concerted protected activity." The Board didn't care whether AMR had other, unobjectionable reasons for the discharge; if the Facebook postings were even part of the company's reason for its decision, the firing was unlawful, they said.

Observers of the labor scene suspect that since pro-worker legislation such as the Employee Free Choice Act isn't likely to be passed by the new congress, agencies such as the NLRB will look to expand employee rights through administrative action. The new Board, which is dominated by openly pro-labor types, has already issued several decisions that seem consistent with that theory. Further, such decisions may not be limited to unionized workplaces. The NLRB has relied on the "concerted protected

activity" concept even when there is no union in the picture.

Our opinion is that this isn't what Congress had in mind when it passed the National Labor Relations Act 75 years ago. Certainly they intended to protect employees who band together to complain to their employer about their working conditions, but vulgar and insulting remarks by an individual worker about a manager in a public forum? If the statements had been made by a subordinate to a supervisor in the workplace, on what planet would that not be a gross insubordination? It appears that with union representation in the private sector hovering at around 10% of the workforce, and organized labor verging on irrelevance, the NLRB is looking for creative ways to flex its muscles.

Accelerated Rehabilitation Isn't Evidence of Guilt

Your employee is accused of criminal misconduct. You don't have solid evidence of the crime yourself, but your employee decides to put the issue behind him by applying for "accelerated rehabilitation," a statutory program that allows first-time offenders charged with a crime to avoid a criminal record by agreeing to certain conditions, usually including a period of probation. Is that sufficient to justify discipline or termination?

Connecticut's Supreme Court says "no." In a recent opinion reviewing an arbitrator's decision upholding the discharge of a Department of Correction employee who allegedly threatened to kill a co-worker, the justices said AR (as it is called in legal circles) cannot be used as evidence of guilt. In fact, the court said, allowing such a conclusion would violate a clear public policy, because the whole point of AR is to allow the accused to avoid protracted litigation without admitting guilt or being found guilty.

The case was somewhat unusual because neither the employer nor the arbitrator were able to determine which of the conflicting stories about the incident in which the alleged threat was made were true. They both relied exclusively on the employee's application for and acceptance of AR, which they found constituted acceptance of responsibility for the offense. While there have been other cases where AR was an issue, few if any involved situations where there was no other evidence of guilt.

Our opinion is that each case depends on its own facts. Also, AR is different from "nolo contendere," where a criminal defendant does not plead guilty but admits there is enough evidence to convict him. Presumably a "nolo" plea may still be used by an employer as evidence of guilt.

"Past Practice" Claims May Be Overrated

If you've ever dealt with unions, you know that when they can't point to a contract provision that prohibits a management action with which they disagree, they often fall back on the concept of "past practice," which says an employer can't change a major or substantial condition of employment without bargaining. The trouble is, past practice can be a subjective concept that means very different things to labor and management. The Connecticut Supreme Court has now stepped in and shot down a recent decision of the State Board of Labor Relations that interpreted the concept too broadly.

The case involved special education teachers in a public school whose caseload was substantially increased when one of their co-workers resigned early in the school year, and couldn't be replaced. The teachers' union asked to negotiate over the change, and the school district refused. The SBLR ruled that the district had changed a "fixed and definite practice," and ordered it to negotiate with the union. The school district's appeal was

Recent S&G Website Alerts

New Puerto Rico Birth Certificates Affect Employers' Form I-9 Process Starting On October 1, 2010, 9/10

New Protections Afforded Whistleblowers Under Dodd-Frank Act, 09/10

Supreme Court Clears Way to Monitor Electronic Messages--Sort Of, 7/10

turned down by a trial court, but upheld by the Supreme Court.

The justices faulted the SBLR for focusing only on the teachers' caseload immediately before and after the change. They said a past practice claim can't be based on a condition in effect for just a short period (in this case since the beginning of the school year), but rather must be a fixed and longstanding condition accepted by both parties. They pointed out that teacher caseload varied from year to year, and that the numbers that resulted from the teacher's departure were not outside the range of historical numbers in the district.

The past practice concept has been used in other ways that were probably never anticipated when the concept was first recognized decades ago. For example, the definition of a "major or substantial" condition of employment has been stretched almost beyond recognition. In one SBLR case, for example, the availability of a coffee pot in the workplace was found to be a past practice.

Our advice to employers is not to accept union claims of past practice or unilateral change without critical analysis, especially where a management decision is based on considerations that are central to the operation of the enterprise. For example, a number of recent statutory and regulatory changes place additional responsibility and accountability on public school teachers. While unions may argue that negotiations are required over such changes, there's an equally valid argument that they are simply part of the job.

Legal Briefs
and footnotes...

Accommodating Alcoholism:
In general, employers are not obligated to accommodate on-the-job manifestations of alcoholism, but the requirements may be different where the effects on the workplace are only indirect. After a work-related injury, a driver whose job required a commercial license could not return to work because his CDL had been suspended due to a non-work related drunk driving conviction. After he was fired, however, an arbitration panel reinstated him because they found he would have had his license back within a month or so, and they thought waiting a short time for the employee's return would have been a reasonable accommodation.

New Mass. Personnel File Law:
There's a new requirement in Massachusetts that employees be notified within 10 days whenever information is placed in a personnel file that may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation, or the possibility of discipline. It's unclear whether this includes supervisory notes or other informal documentation, or how to determine whether something may "negatively affect" an employee. The law also permits employees to review any material of which he or she is notified. Practitioners have commented that this new statute raises more questions than it answers.

Cop Beats the Rap Again:
This spring we wrote about two Hartford police officers who sued the City and won six-figure awards after successfully defending themselves against claims brought by suspects they had shot while performing their duties. The judgments were based on a statute requiring indemnification of

municipal employees acting in the line of duty. Now one of the two, Robert Murtha, has added insult to injury by winning reinstatement and back pay from the State Board of Mediation and Arbitration, which found the City had failed to prove the officer had used excessive force when he fired at a fleeing suspect. Our spring article on this subject predicted that result.

Is Job Offer Binding? Not long ago we reported on a court decision that said an offer of at-will employment could be revoked even before the offeree started work. The theory was that if a contract for at-will employment could be terminated at any time, it could be terminated before the employment even began. However, another plaintiff got better results in a similar situation by basing her claim on a theory of "promissory estoppel" rather than breach of contract. The court ruled that if the offeree could show that she had relied on the offer, for example by quitting her previous job or moving her residence; that she acted reasonably in doing so, for example because the offer was not dependent on a reference check or other condition; and that her new employer reasonably should have anticipated that she would take such steps in reliance on the job offer, she could win her case.

Now We've Seen Everything: So you think employment laws in our country can produce wacky results? Consider this decision from a Brazilian judge. He ordered McDonald's to pay $17,500 to a former franchise manager who gained 65 pounds during his 12 years in the fast food business. The plaintiff claimed he had to sample his calorie-laden wares every day because McDonald's hired people to make unannounced visits to check on the quality of the food he served. Meanwhile, the fast food giant is defending claims in this country that its advertising is aimed at deceiving children into thinking its food isn't fattening. Judgin from the apparent growth of juvenile obesity, the ads must be working.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539