SYMPOSIUM COMMENTARY

FACEBOOK FIRING: THE INTERSECTION OF SOCIAL MEDIA, EMPLOYMENT, & ETHICS*

Panel 1 – Employment Implications of Social Media Use

REMARKS OF WILLIAM A. HERBERT**

Good afternoon. First, I just wanted you to recognize that we're very fortunate at PERB in that we've had a long term relationship with the law school and having interns come and work with us. Alicia McNally is proof positive that internship programs can lead to jobs even in a tough job market. So, just be

* On November 6, 2013, the Albany Law Journal of Science and Technology presented a symposium on the interaction of social media, employment, and ethics. These remarks have been annotated and edited by the Journal staff. The webcast of the event is available at http://www.totalwebcasting.com/view/?id=albanylaw.

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aware that when you're listening to her, realize that her employment at PERB was a direct result of her fine work as an intern with us. Now the three topics that Alicia and I are going to be discussing today are first, what constitutes protected activity in social media under the National Labor Relations Act, under the First Amendment and under public sector statutes. The second issue is, what are the scope of protections or the scope of limitations that employers must follow when it comes to imposing policies? The third issue is the application of just cause and progressive discipline in social media cases.

But before I get there, I wanted to just do a little bit of a side-note and point out that, you see this machine *[holds up iPhone]*, this machine can constitute a weapon for you that could harm you and could also harm others. It doesn't come with any kind of a program or a model or a book to establish how to use it. It requires that you apply yourself in the following way: something that is almost counter-cultural at this point, which is self-discipline. And the reason that I say that is that the topic that we are talking about is *firing* under Facebook, but it is also applicable to *hiring*, and so each of you when you are utilizing technologies like a smartphone and using social media you must be cognizant of your electronic footprints. All the cases that we will be discussing today, or most of them, stem from electronic footprints.[1] And so, applying self-discipline is critically important. I know it's difficult though. In an age of distraction, in an age of videos and in an age of wanting to know everything going on immediately, there is a tendency to over-rely on this kind of technology. It's a fabulous technology, but it's fraught with danger for yourself professionally, as well as for your clients in the future. In discussing that, I want to point out an important development that happened last year. The American Bar Association amended its comments under the Model Rules of Professional Conduct with respect to technology and the definition of competence. And in that, they changed the comments on Rule 1.1 of the Model Rules to state that competence includes knowing the benefits and risks of relevant

[1] *See generally* James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 20 (2003) (explaining electronic footprints as the data left behind by someone when they visit a website that allows sites to record information about the visitor, including their internet service providers and internet use habits).

technology.[2] So you as a law student, whether you're working as an intern or working on a case as part of a clinic, or whether you're just posting things, keep in mind that you have to know the risk and benefits connected with the technology, or you may wind up with having problems down the road and we don't want to see that happen, right?

Now, basically the case law that has developed, most of the case law stems from a series of decisions by the National Labor Relations Board. The National Labor Relations Board is responsible for the National Labor Relations Act,[3] which is a private sector statute that was enacted during the New Deal, which protects employees' associational rights under Section 7.[4] What has happened is that with the social media there has been almost a rediscovery of the statute, even though it has been around since the great depression. The National Labor Relations Board has issued four major decisions, which I will discuss, as well as a variety of advice memoranda that provide a great pool of information about the protections of the National Labor Relations Act.[5] The other case law that we are going to be discussing are First Amendment cases for the public sector, as well as state laws such as the Taylor Law,[6] which is the statute that Alicia and I help administer. And the other provisions are terms of collective bargaining agreements and judicial arbitration decisions. Alicia will be discussing the last two during her presentation.

The first thing to realize is that the National Labor Relations Act has Section 7. Section 7 provides that private sector employees are protected for engaging in certain activities for purposes of collective bargaining (basically, organizing for unions, etc. is protected by Section 7),[7] but it also protects with respect to mutual aid or protection.[8] Most of the cases that have come down through the National Labor Relations Board have

[2] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2012).

[3] *See* 29 U.S.C. § 153a (1935) (establishing the National Labor Relations Board as the party behind the National Labor Relations Act).

[4] *See* 29 U.S.C. § 157 (1935) (highlighting the rights of employees to take part and form labor organizations and unions).

[5] *See* Design Tech. Group, LLC, 359 N.L.R.B. 96 (2013); Costco Wholesale Corp., 358 N.L.R.B. 106 (2012); Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 (2012); Karl Knauz Motors, 358 N.L.R.B. 164 (2012).

[6] *See generally* N.Y. CIV. SERV. art. 4 (McKinney 1969) (describing the functions and rights of New York's public labor unions).

[7] 29 U.S.C. § 157 (1947).

[8] *Id.*

been based on the latter part of Section 7, which you should realize, that this statute was intended (and actually the statute itself states), that its purpose was to grant full rights of association to private sector employees in the workplace. And that full right of association includes the ability for people to get together and discuss terms and conditions of employment and about improving their working conditions. So most of the cases that have come down from the National Labor Relations Board have not been cases where people have been in the union or are even seeking to form a union, rather, they involve situations where either there has been a challenge to a workplace policy that has been in existence or they have been terminated and now they are seeking to challenge their termination based on the fact that they were fired for the post(s) on Facebook.

The first case that I want to mention is a case called *Costco*.[9] Costco is not organized. Costco is a nonunion shop.[10] What happened in *Costco* was that there was a policy, which was in place, which said that any employee who engaged in social media that would harm the reputation of other employees, or would engage in other conduct and speech that would be affecting other employees was a violation of their rules.[11] The National Labor Relations Board examined that policy and concluded that that policy violated Section 7 because it chilled (or it had the ability to chill) a reasonable employee from engaging in Section 7 activities for mutual aid and protection.[12] In other words, if you're having discussions with your coworkers over, you know, salaries, and you are having a discussion about what way you want to improve your working conditions, or in what way the employer is not doing enough for you, and the employees are discussing that, this policy could wind up being imposed against the employees and they could be disciplined.[13] So, the NLRB found that that violated Section 7.[14]

In the next case, involving a car salesman who was annoyed with his employer and posted a photograph and some jokes about an accident that had happened, not at his employment, but at

[9] Costco Wholesale Corp., 358 N.L.R.B. 106 (2012).

[10] *See id.* at 6 (discussing the testimony from a witness who stated that employees were attempting to form a union).

[11] *Id.* at 1.

[12] *Id.* at 15.

[13] *Id.* at 1.

[14] *Id.* at 15.

another site, the NLRB found that that speech activity was not protected because it did not deal with the terms and conditions of his employment.[15] In that case (and there was a lot of controversy over this decision), the NLRB found that a policy which required employees to engage in courtesy to other employees chilled Section 7 rights because inevitably when people are engaging in conduct at the workplace, with respect to their terms and conditions of employment, it is possible that they will be discourteous.[16] For example, "Why do *you* have a salary higher than me?" Those kinds of discussions can lead to discourteous conduct, so the NLRB found in that case that that policy violated Section 7, and the employer was required to take down that policy.

The third case[17] that is important, and this is a case which sort of gives you a perfect example of the differences with respect to the protections of Section 7. And that is a case out of Buffalo involving a not-for-profit in which one employee found out that the new supervisor was about to go to the executive director to complain about the work habits of some of the employees. The employee who found out about this possible report went online during her own, non-work hours, and posted to her friends (her Facebook friends who were coworkers), raising issues about people complaining about their work and raising issues about engaging in some kind of collected activity. As a result of those posts that went back and forth between four and five employees, all of those employees were fired. The NLRB ruled that those terminations violated the National Labor Relations Act because the NLRB found that those posts were for mutual aid and protection connected with the possibility of them being disciplined over their work habits.[18]

In the fourth case,[19] a case out of Haight-Ashbury in San Francisco, this is a clothes store where the employees took their complaints about various issues (about safety and other things) and started posting about them. The store employer terminated the employees for those posts, and the NLRB found that this was also a violation of the National Labor Relations Act and set aside those terminations. But in raising these cases, I have to

[15] Karl Knauz Motors, Inc., 358 N.L.R.B. 164 (2012).
[16] *Id.*
[17] Hispanics United of Buffalo, Inc., 359 N.L.R.B. 37 (2012).
[18] *Id.*
[19] Design Tech. Grp., 359 N.L.R.B. 96 (2013).

emphasize an important point: Facebook activity, or any kind of social media activity, or *any* kind of speech activity (it doesn't have to be Facebook), in order for it to be protected, has to be for mutual aid and protection.[20] It can't be what is sometimes referred to as 'mere griping.' Someone going online and complaining that they don't like to work, or they don't like their job, or they don't like their supervisor; is not per se protected speech under the National Labor Relations Act.[21] Rather, it has to be aimed at inducing other employees to engage in collective activity rather than individual activity.[22] The whole point of the National Labor Relations Act is to protect collective action, not necessarily individual action. So, in terms of looking at these cases, keep that in mind that going online and making a complaint about work or the burdens of work is not going to necessarily be protected under the NLRB decisions. Although, these decisions have resulted in a tremendous amount of publicity and some people have misunderstood that just mere griping about work is not appropriate here. The other exception here, which is important to know is that egregious speech, which goes beyond the pale in terms of appropriateness, is found to be unprotected activity even if it's tied to collective action. So, engaging in certain kinds of comments about supervisors, even though it is tied with an organizing effort or any kind of collective action, can still be found to be unprotected because it is so egregious.[23]

Now, in comparison, the statute is described as a federal private sector statute. A distinct statute is the public sector statute, which in New York is the Taylor Law.[24] I have given you three cases cited here which lay out the following proposition: in order to have speech or conduct protected under the Taylor Law,

[20] *See* Andrew F. Hettinga, *Expanding NLRA Protection of Employee Organizational Blogs: Non-Discriminatory Access and the Forum-Based Disloyalty Exception*, 82 CHI.-KENT L. REV. 997, 1001 (2007) (explaining that organization speech is insulated from adverse employer action if it is concerted and for mutual aid and protection).

[21] *See id.* at 1001–02 (stating that an individual's expressive activity is only protected if it implies a common goal to alter workplace conditions).

[22] *See id.* at 1002 (acknowledging that Section 7 only protects speech that encourages concerted employee action).

[23] *See* Costco Wholesale Corp., 358 N.L.R.B. 106 (2012) (quoting Tradesman Int'l, 338 N.L.R.B. 460 (2002)).

[24] *See* N.Y. CIV. SERV. LAW § 200 (McKinney 1969) (stating that it is the public policy of the State of New York to promote cooperative relationships between the government and its employees).

employees must be engaged in some kind of speech activity or some kind of activity tied with joining, forming or participating in a union.[25] Mere conduct for mutual aid and protection is not protected under the Taylor Law.[26] So, in order for any kind of social media activity to be protected, it has to include speech tied with joining or participating in a union. Now, those are statutory provisions that are applicable to social media and what I want to turn to now are cases involving the First Amendment, which some of you have presumably taken constitutional law at this point. There's a series of cases but I do not think I'll have the time to go through all of them, but let me just give you a summary (the list is set forth [on the power point presentation]). Basically, remember I talked about under the National Labor Relations Act, in order for the speech to be protected it has to be about terms and conditions of employment…it has to be involved in the mutual aid and protection of the terms and conditions of employment. In contrast, under the First Amendment, speech is protected if it deals with an issue of public concern, and the Supreme Court has increasingly made clear (although it has been clear for some time) that when people engage in activity and speech activity related to work, per se, that that does not constitute an issue of public concern for purposes of the First Amendment.[27]

So, for example, in *Pickering*,[28] the first case, there was a teacher who wrote a letter to the editor about concerns over issues about a proposed purchase of bonds (a bond act), and made comments that were derogatory towards the district and what the district had done with bond money previously. That was found to be an issue of public concern.[29] However the next case, in *Connick*,[30] was a lawyer who decided to circulate a questionnaire to her coworkers in a DA's office in New Orleans, and the questionnaire asked questions like, "Do you feel overworked?," "do you feel that the office space is sufficient?," "do you feel that the working conditions are proper?"[31] The Supreme Court in that

[25] 43 PERB ¶ 4521.

[26] *See* N.Y.C. Transit Auth. v. New York State Pub. Empl. Relations Bd., 8 N.Y.3d 226, 239 (2007).

[27] *See* Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, 391 U.S. 563, 574 (1968).

[28] *Id.* at 566.

[29] *Id.* at 570.

[30] Connick v. Myers, 461 U.S. 138, 141 (1983).

[31] *Id.* at 155.

case found that those are the kind of issues that do not touch upon an issue of public concern, and most importantly found that it was beyond the protections of the First Amendment.[32] Under this case, those kinds of communications are beyond the protections of the First Amendment.[33] Another case, which is important to keep in mind, is a case called *Garcetti*.[34] And *Garcetti*, in some level, brought this dichotomy between issues of public concern and workplace issues and drew us a very firm line between those two, and said, in essence, that if a public employee engages in any speech that is tied to their official duties, that that speech is unprotected under the First Amendment. Even if it deals with whistleblowing, even if it deals with issues that the public should know about, that if they were doing it as part of their official duties, it's unprotected. And finally, in the case that's most recent (2011), in a case that's called *Borough of Duryea*,[35] the Supreme Court extended this line of thinking to the question of petitioning, of the right to petition, which is a separate clause in the First Amendment; and they found that this dichotomy between public concern and workplace issues are equally apt to the right to petition.[36]

So how do these cases fall into social media? Ultimately, if a public employee engages in social media about working conditions, it is very unlikely that that speech will be found to be protected under the First Amendment, and they will have no constitutional protections if it's just about work, whether it's griping or whether it's talking to coworkers about their working conditions. On the other hand, if the speech involves issues of public concern, such as political activity, social activity, things that have a greater sweep, potentially, that speech on the postings would be found to be protected activity.[37] And one other matter is in terms of policies. Under the First Amendment, policies that prohibit speech are going to be given greater scrutiny. So when devising policies in the public sector, an employer has to be very careful in terms of deciding what to prohibit, because if a policy prohibits speech, it's going to be given a higher level of scrutiny as a prior restraint. And so

[32] *Id.* at 154.
[33] *Id.*
[34] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[35] Duryea v. Guarnieri, 131 S. Ct. 2488 (2011).
[36] *Id.* at 2495.
[37] *Connick*, 461 U.S. at 146.

drafting of policies in the public sector is also, or can be, challenging for an employer. We're going to hear from Mike shortly, who is going to describe some of the issues associated with drafting policies. So under the National Labor Relations Act, a private employer has to be concerned about drafting a policy which would chill Section 7 rights. In a public sector, a public employer has to be concerned about a policy which chills speech on a matter of public concern.

So, let me just sum up now. When it comes to issues involving the public sector, the reality is that when it comes to the public sector in New York, union density is much higher than the private sector. As a result of union density in the public sector, it is more common for policies and procedures to be negotiated, whether formally through a collective bargaining agreement, or informally by having some kind of consultation between the public employer and the employee organization who is representing those employees. From a practical standpoint at PERB, we have not yet had a decision issued on the issue of social media under the Taylor Law. The reason for that, I believe, and this is pure speculation, is that the statute's working. That in essence, issues like social media are getting resolved because of the presence of a union that can discuss and resolve issues with an employer before policies are imposed. In the private sector, as you see, there are a lot more decisions that have come down. I know I gave you the NLRB decision, the NLRB board decisions. There have been administrative law judge decisions and a whole host of advisory opinions, and those cases are generally coming from where there is not a union in place. Those cases are coming because, now what's happening is that people are going to the National Labor Relations Board, who are unrepresented by a union, and there's no ability to have negotiations or a resolution of a dialogue between the employer and the employees to reach an agreement as to (and it need not be a formal agreement), but reach an agreement about what would be a practical thing for both employees and employer. So with that, and laying out the law, I'm going to turn the podium over to Alicia, who's now going to describe the application of just cause and progressive discipline in the context of collective bargaining agreements where employees have protections against discipline, that are enforceable through arbitration.