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

Panel 1 – Employment Implications of Social Media Use

REMARKS OF ALICIA MCNALLY**

So, like Bill said, I'm going to talk about how the just cause standard applies in employee discipline for use of social media. I know you guys have all heard the term 'employment at will.' This is the opposite of that. The employer has to have just cause in order to discipline or fire the employee. They get this from collective bargaining agreements, or it's imposed statutorily. Until 1966, what 'just cause' was, was very unclear. Arbitrators would try to enforce collective bargaining agreements and apply a very wishy-washy standard. They would make their own definitions and apply their own tests. In 1966 arbitrator Carroll Daugherty devised the "just cause" test.[1] There are seven steps and that's what we are going to be going through today.[2]

The first one requires that the employee have notice of the

* 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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[1] *See generally* Enter. Wire Co. & Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.) (developing a seven-step test for "just cause" where the aggrieved party claimed he was unduly fired).

[2] *Id.*

possible consequences of their misconduct.[3] The second requires that the rule that the employer has be reasonably related to the company's business and the performance of the employee that the company can reasonably expect of them.[4] The third is investigation.[5] It requires that the company actually perform an investigation to determine whether the employee violated the rule.[6] The fourth is that the investigation be conducted fairly and objectively.[7] The fifth requires that the employer actually have substantial evidence of the guilt of the employee.[8] The sixth requires that the company not actually discriminate against the employee in applying their rule.[9] If you ignore it for one employee then you have to ignore it for other employees and vice versa.[10] And the last one is the degree of discipline, which deals with very particular circumstances, the seriousness of the employee's offense, and also the record of the employee.[11] That deals more with the idea of progressive discipline as Bill had discussed. He said the employee had engaged in conduct that had violated the employer's rules over and over again and had been given less severe punishment along the way.

So, I have been through a bunch of arbitration decisions and although they are not all consistent, I was able to come up with kind of some overall points that you guys should keep in mind in applying. The first thing we are going to talk about is the notice, and it may come to a surprise to you that most employer's do not have social media policies, even today. In that case, it's hard for arbitrators to say that employees have notice that their misconduct will actually lead to their termination. For example in one case, a teacher was using Facebook to interact with students for educational reasons, but also posting abusive comments . . . complaining about classes, complaining about their work.[12] One of the comments that she wrote under a student's work on her Facebook page was, "You know there are always employment opportunities in food service and housekeeping

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 2010 AAA Lexis 1210, at *14, *27 (2010) (Markowitz, Arb.).

industries."[13] There are a bunch of other ones but that was probably the worst. And, based on the fact that the employer had no social media policy, the arbitrator declined to the find that the employee had engaged in misconduct and she was not given a reprimand for her actions on Facebook.[14] In another case, a teacher was using Facebook for communications with students for educational purposes, but he also was posting inappropriate pictures.[15] One was a bumper sticker, apparently from a school trip that said, "Fuck the man, become the man."[16] And another one was captioned, "Accidental porn" and it showed a weatherman standing in front of a weather map that had an elongated weather system in an inappropriate place.[17] The arbitrator found that because there was no social media policy in place that the employee had not engaged in misconduct because he had no notice that what he was doing was inappropriate.[18] Now that being said, arbitrators and employers have applied other policies to the misconduct of employees. One would be an Internet policy for personal use. So, that applies when an employee is just using social media on the employer's computer and they shouldn't be. You're going on your Facebook, you're going on your MySpace (even though, you know, we don't have those anymore), and the employee can still be disciplined just for engaging in that conduct. Another one is 'immorality and conduct unbecoming' policies. So, those will say something like, "employees are not to act immoral or engage in conduct that is unbecoming of police officers, or firefighters . . ." And in those cases, the arbitrators have found that, for example . . . a teacher's ex-wife posted nude photos of him.[19] Clearly the photos were immoral and it was conduct unbecoming, and just based on *that* policy, the arbitrator found that the teacher had engaged in misconduct.[20] In another case a college police officer posted a picture of himself next to a marked campus security vehicle (so it

[13] *Id.* at *15–16.

[14] *Id.* at *38–39.

[15] *See* Recommended Order, Manatee Cnty. Sch. Bd. v. Willis, No. 10-10087, (Mar. 31, 2011) (finding no "just cause" for termination where a school board failed to notify a teacher that his actions were inappropriate).

[16] *Id.*

[17] *Id.* at *5–6.

[18] *Id.* at *4.

[19] Warren City Bd. of Educ. & Ohio Educ. Ass'n, 124 Lab. Arb. Rep. (BNA) 532 (2007) (Skulina, Arb.).

[20] *Id.*

was clear that he worked for the campus), and it was on a dating website and it had inappropriate information about what his preferences were in dating, and they found that that was conduct unbecoming and he was disciplined for that.[21] Other policies are sexual harassment policies. If you post inappropriate things about your coworkers, you can be disciplined for that, just based on what you said, whether or not there's a social media policy in place. The last one I have is 'patient privacy' policies. That's mostly for medical professions, with HIPAA regulations, and hospital employees have been disciplined for posting information about patients that they treat. Even when employers do have social media policies, as Bill discussed, it becomes problematic if they infringe on protected employee activity or First Amendment rights.

So the second prong of the test is, "is the rule reasonably related?"[22] Arbitrators don't usually discuss this aspect of the test. I was able to come up with a couple of things that employers should keep in mind when they decide to create a lot of these rules. One is, does the—does the rule attempt to regulate the conduct that is connected from the employer's enterprise. And another, does it/will it impair employee's personal communications?

As long as the rule does not infringe upon private communications, it's probably ok. In one case, an airline had a policy of an employee, using/blogging social media websites for abusive, unprofessional, or threatening comments toward management.[23] They were prohibited from doing that, and an employee went on and said "I'm pissed about X, Y, and Z with my scheduling," and his Facebook was set to the highest privacy settings, so he thought "well this is completely private, no can see it, doesn't matter."[24] Well, at least one of his coworkers was permitted to access that website, and just based on that, the arbitrator found that the rule was reasonably related, because it required the context and the content of the speech, and at least one other employee was permitted access to the page, which brought the speech into the unlimited environment.[25]

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[21] 2008 AAA LEXIS 889, at *10–11 (2010) (Siegel, Arb.).

[22] Enter. Wire Co. & Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.).

[23] Konop v. Hawaiian Airlines, 302 F.3d 868, 872–74 (9th Cir. 2002).

[24] *Id.*

[25] *Id.*

The next test is investigation.[26] It's unclear what the actual level of investigation required is, for employers to bring these disciplinary charges against employees for social media purposes, but I did find one case that suggests a very high burden.[27] An employee was originally investigated for using his computer to access MySpace and Facebook.[28] During that investigation, they realized that there was sexually explicit websites he had accessed as well.[29] So they decided to look on the hard drive of the computer, where they found child pornography, and turned it over to the police.[30] A criminal investigation ensued, and the State Police issued a forensic report and did not press charges.[31] The report said that the access to child pornography *may* have been inadvertent, although no other employee's computer had inadvertent child pornography on it.[32] And it said that someone else could have accessed the child porn if the employee was away from his computer, but there was a security feature that required a forced logoff after 15 minutes of the computer being idle.[33] Just based on those two points, the arbitrator found in favor of the employee and fully reinstated him.[34]

The next is the fairness of the investigation.[35] This is highly fact specific. In most cases, it's really hard to predict what's going to be considered fair and not fair. But, for example, in one of the cases that I found, a teacher who was complaining about her students, were on her Facebook.[36] They did not get information or present us testimony from the students, on how the Facebook posts actually impacted their ability to learn.[37] Just based on the fact that the employer did not investigate that portion of their

[26] *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359.

[27] AK Steel–Butler Works & United Auto Workers, Local 3303, 124 Lab. Arb. Rep. (BNA) 903, 910–11 (2012) (Dean, Arb.).

[28] *Id.* at 903, 906.

[29] *Id.* at 904.

[30] *Id.*

[31] *Id.* at 909.

[32] *Id.*

[33] *Id.* at 910.

[34] *Id.* at 911.

[35] Enter. Wire Co. & Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.).

[36] *See* 2010 AAA Lexis 1210, at *5–6 (2010) (Markowitz, Arb.) (noting that the teacher used Facebook to communicate with students, post graded assignments, and write derogatory remarks).

[37] *See id.* at *37 ("That the complainant was on Facebook might have created an educational problem were it read by students but . . . no student testified as to the negative consequences of reading these comments.").

charge, the arbitrator declined to discipline the employee.[38]

In another case, there was a rule that prevented employees from talking about political activity on social media sites.[39] It's a small town, and the employees were police officers, and the city felt that if police officers were allowed to express their views, that they could impact the way that other people would vote because of their position.[40] And in that case, one of the police officers had posted on the mayoral candidate's Facebook page, and said that he worked for the city, and that a change was really needed, and thanks for stepping up, to the candidate.[41] The chief thought that was inappropriate and decided to conduct an investigation through a private investigator rather than through the police department, because it was so small.[42] The employee tried to challenge that investigation, saying that he should have had it through the police department, but the arbitrator found that the private investigator was actually—results in a fair investigation because of the size of the police department.[43]

The next test is substantial evidence of guilt.[44] So, due to the faceless nature of social media, employers can rarely determine who actually posted something on a social media website. You give your password to your girlfriend, or you leave your Facebook up when you leave the house, or you leave, you know, one of the offices here, and anybody can get on. So, in one case, an officer logged onto- allowed others onto his Facebook account and they posted inappropriate pictures of him.[45] Well, the arbitrator found that the officer was still guilty of misconduct, because they allowed a person access to that account.[46]

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[38] *See id.* at *50–51 (noting that the charges relating to the Facebook posts were dropped due to lack of investigation, but the employee was still disciplined for other offenses).

[39] N. Bay Vill. & Dade Cnty. PBA, 131 Lab. Arb. Rep. (BNA) 275, 281 (2012) (Wood, Arb.).

[40] *Id.* at 282.

[41] *Id.* at 278.

[42] *Id.*

[43] *Id.* at 285.

[44] *See* ADOLF M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS 23–24 (Donald F. Farwell, 2nd ed. 1992) (explaining the seven steps method, the author provides pointed questions for each of the steps. Step 5 provides: "At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?").

[45] *See* 2008 AAA Lexis 889, at *4 n.2, *6 (2008) (Siegel, Arb.) (discussing how the website mentioned in the decision is Facebook and the inappropriate picture was not posted by the employee).

[46] *Id.* at *13–14.

However, in another case, where an officer had logged onto his wife's Facebook to discuss something with his daughter while on duty—which apparently was allowed in this case—another officer found the open Facebook page and used the wife's account to play a prank on his fellow officers.[47] First, he updated the officer's wife's status to "Oops I pooped my pants," then he told the sergeant he looked sexy in his uniform, then he left a comment next to a picture of Michigan police saying "sweet ass," and finally he contacted one of the sergeant's girlfriends, and suggested an all female threesome for the sergeant's birthday.[48] None of the officers were amused by this, and it became apparent that the one officer had left his wife's Facebook open.[49] And as they investigated the issue, they were only able to determine that the guilty employee had used the computer at a time close to when the posts were made.[50] Fortunately for the employer, the employee actually came forward and admitted to what he did, after denying it several times, but if he had not, it's unlikely the arbitrator would have been able to enforce the discipline.[51]

To make things more complicated for the substantial efforts test, it's virtually impossible to determine *how* something got on the Internet.[52] Was it originally posted by the person that put it on Facebook, or was it posted by someone else? In one case, a hospital employee posted a picture of hundred dollar bills across the ER nursing station counter, with the caption being "the things you find under patients with no jobs."[53] And the employee claimed that she didn't take the picture or write the caption, but found it on an ambulance driver's Facebook, thought it was funny, and reposted it.[54] The employer presented no evidence as to where the picture came from, and didn't identify a patient who

[47] Kinnas v. Town of Shrewsbury, No. D1-10-151, 24 MCSR 418, at *4–5 (2011).

[48] *Id.* at *5.

[49] *Id.* at *4.

[50] *Id.* at *13.

[51] *Id.*

[52] *See* Michael Bettinger & Peter Berger, *Can Intellectual Property Be Protected On The Internet?*, 16 NO. 3 ANDREWS PHARMACEUTICAL LITIG. REP. 11, 11 (Aug. 2000) ("Although technology exists which can track both posting to and downloading from the Internet, users still enjoy a large degree of anonymity.").

[53] *See* Grievant 1-Labor Union v. Grievant 2, 2010 WL 5583163 (AAA), at *1 (2010) (Lowe, Arb.) ("On one page was a picture of what appeared to be the Nursing Station in the Emergency Department (ED) with a splay of hundred dollar bills across the table with a notation underneath the picture 'THE THINGS YOU FIND ON YOUR PATIENTS WITH NO JOBS. . . . LOL.'").

[54] *Id.*

entrusted the hospital with a large sum of money.[55] Just based on the lack of evidence, the arbitrator found in favor of the employee.[56]

The next test is discrimination.[57] The employer must evenhandedly apply its policies.[58] And in one case, the arbitrator found that the employer was not evenhandedly applying its policy when a nurse took a picture of a patient, and posted it on her FB, but other nurses had taken pictures several times and posted them without being disciplined.[59] Apparently, it was a children's ward, and they had pictures of the patients with Santa, the Easter Bunny, wearing Halloween costumes . . . and the social media policy specifically prohibited posting *private* patient information, for social media uses.[60] But it was not clear that the picture was private, and so the arbitrator declined to discipline the employee.[61]

In another case, an employee was found with sexually explicit materials on his computer.[62] Through MySpace—he was accessing other people's MySpace accounts that had sexually explicit material on them, and he was downloading the pictures onto the hard drive of the computer.[63] Another employee was found with similar material—although it's not clear if it was from social media sites—on his computer, and given a ten-day suspension.[64] This employee was terminated, and the arbitrator found that his termination was grossly disproportionate as compared to the ten-day discipline, the ten-day suspension of the other employee.[65]

And finally, we have the degree of discipline.[66] As in any other misconduct scenarios, the degree of discipline in social media depends highly on the facts. One fact however, that arbitrators

[55] *Id.*

[56] *Id.*

[57] UNIV. OF CAL. MERCED HUMAN RES., PROGRESSIVE DISCIPLINARY GUIDELINES 9 (2010), *available at* http://hr.campuscms.ucmerced.edu/sites/hr.ucmerced.edu/files/page/documents/progressive_disciplinary_guidelines.pdf.

[58] *Id.*

[59] *See* 2013 AAA LEXIS 116, at *56–57 (2013) (Bornstein, Arb.) ("[N]o other nurse on Unit 6 has been disciplined for violating Use of Personal Electronics in the Workplace policy.").

[60] *Id.* at *32, *56–57.

[61] *Id.* at *58.

[62] 2008 AAA LEXIS 558, at *47 (2008) (Henderson Ellis, Arb.).

[63] *Id.*

[64] *Id.* at *64.

[65] *Id.* at *1, *64.

[66] UNIV. OF CAL. MERCED HUMAN RES., *supra* note 57, at 9.

seem to rely on generally, is who the audience of the posting is.[67] In one case, a teacher posted comments that could have been interpreted as antagonizing a student for having an alcoholic mother.[68] He had—the student had showed up late to an afterschool concert in which he was supposed to a give a solo for the teacher.[69] He was not able to give the solo and told the teacher it was because he had to pick up his drunk mother at a bar.[70] So the next day, the school teacher posted on his Facebook, "Note to self, don't leave mother drunk in bars anymore."[71] It was clear from the record, however, that the teacher had blocked the student that the Facebook post was about, from his Facebook, and there was no evidence presented at the hearing—or at the arbitration—that the student ever read the Facebook post.[72] So based on that, the arbitrator found that he should not have been given a three-days unpaid suspension, that he should have actually been given a written reprimand, because the harm just wasn't there.[73]

In another case, a group of teaching assistants engaged in conversations about their supervisors on one of the employee's Facebook pages.[74] The group posted comments such as: "It's off to work with snitches and rats;" "Talk to me some more about white-ass bitches 'cause I got something for you;" "Die bitch, die;" "I can't stand fake-ass bitches;" and "I hate when bitches want you to be on time, but can't be on time themselves."[75] The fact that the posts were on a private page, and never intended to be read by the objects of their venting, was a mitigating factor as the arbitrators saw it.[76] Although it should be mentioned that the most vulgar comments—the employee who made those, was still

[67] *See* 2011 AAA LEXIS 131, *13–14 (2011) (Mazurak, Arb.) (discussing how the penalty was too harsh because the Facebook post was not directed or intended to harm the grievant).

[68] *See id.* at *1, *4–8 (suspending the grievant without pay for 3 days because of comments made regarding a student's alcoholic mother).

[69] *Id.* at *2–3.

[70] *Id.* at *3.

[71] *Id.* at *6.

[72] *Id.*

[73] *Id.* at *8.

[74] *See* 2011 WL 10111140 (AAA), at *1–2 (2011) (VanDagens, Arb.) ("During cross examination, Grievant admitted that "ca" in Entry #1 referred to [Grievant 3], the Center Administrator at Holy Redeemer.").

[75] *Id.* at *2.

[76] *See id.* at *12 (deciding that a lesser penalty was appropriate because the posts were never meant to be made public).

terminated, and that was upheld.[77]

So, to conclude, just be aware of what you're posting, that people can read it, that your employers can read it, and it will get you in trouble one day if you're not careful. Thank you.

[77] *Id.* at *13.