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

Panel 1 – Employment Implications of Social Media Use

REMARKS OF MICHAEL D. BILLOK**

My name is Michael Billok. I am an attorney at Bond, Schoeneck & King, and as Ryan mentioned, I'm here to provide the *employer* perspective, or the perspective of the attorney advising the employers about how to deal with these issues. One of the amazing things about this topic that struck me while I was listening to everybody's presentation, is that you've gotten nothing but substance for the past forty-five minutes to an hour and we could continue going for the next three or four hours (and maybe we should . . . no . . . we're not going to), but we could keep going and not overlap topics, which is amazing. So, what I'm going to try to do here is hit the high notes, give you a little smorgasbord of issues, where social media interacts with employment, with firing and a few others, hiring, as Bill mentioned as well, maybe a few others you haven't thought about. Obviously, the focus is firing and Facebook, and we'll talk

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** Michael Billok is a labor and employment law attorney at Bond, Schoeneck & King in Albany. He represents clients in state and federal court here in New York, before the National Labor Relations Board, before the Equal Employment Opportunity Commission and before the New York State Division of Human Rights. It's also notable that he is a graduate of the U.S. Naval Academy, and he served as a submarine officer in the U.S. Navy until 2004.

about that as well.

So, I guess starting at the beginning, before you can be fired, you have to be hired (traditionally . . . I haven't seen a case holding the opposite). But I was asked on the way in by the man who brought me in in terms of, "Okay, so should I just delete my Facebook account before applying to work with an employer?" The answer is no, but you do need to be aware that yes, employers *do* look at social media when screening candidates, and in terms of the surveys that we've seen (as you can see on the screen) 56% admit to it.[1] I think more probably do it than admit to it because they are worried that somehow they're admitting liability even on an anonymous survey. And what is being searched? You can see that LinkedIn is number one.[2] So, if you don't have a LinkedIn profile, you should get one. It's what employer's look at. It's that online résumé. But they're looking at Facebook, they're looking at Twitter. Alicia mentioned that Myspace is going away and this survey certainly shows that.[3] In terms of why employers don't hire candidates (this is again according to the employers why they're not doing it); the top two here are inappropriate photos and information and references to drug and alcohol abuse.[4] On your Facebook page, if you have no privacy settings whatsoever and anybody can see it, and you've got pictures of yourself doing a naked keg-stand, I can guarantee that you're going to have a very difficult time finding a job. Other comments are poor communication skills.[5] In your Facebook posts, you're using short texts or there are a lot of misspellings or grammar problems, employers see that and they're thinking, "this person cannot write in simple sentences, how am I going to hire them to write briefs for me?" Discriminatory comments and misrepresentations about qualifications are big ones as well, and you can see from most employers looking at LinkedIn, they're checking what are you putting on LinkedIn versus what you're putting on your résumé, to see if you're lying on your résumé or

[1] Society for Human Resource Management, SHRM SURVEY FINDINGS: SOCIAL NETWORKING WEBSITES AND RECRUITING/SELECTION 2 (2013).

[2] *Id.* at 3.

[3] *Id.* at 5.

[4] *Thirty-Seven Percent of Companies Use Social Media to Research Potential Job Candidates*, CAREER BUILDER (Apr. 18, 2012), http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099.

[5] *Id.*

not.[6]

So, in terms of the questions, "Can employers look at social media?", "Should employers looks at social media in hiring?", the answer is "Yes, but . . ." with the "but" being that when looking at social media, when using Google and Facebook and looking at profiles, you're looking at a lot of information that can contaminate the hiring process. You're finding out information, that Ryan mentioned labor law 201(d) union activity; if you're looking at somebody's Facebook posts and you see that they were there at a pro-union rally and you don't hire them, the person might say, "Well, I wasn't hired because they found out I'm pro-union," or anything else that's protected by Title VII or any other class. So in terms of what we recommend for employers if they're going to use social media in the hiring process, the first thing is, what are you searching *for*? Do you just let your recruiters, do you just let your screeners, go wild on Google to try to find anything they can find, or do you have a defined search criteria? What are we looking for? We're going to verify the employment history and that's it. Or, we're going to look for possible lapses in judgment, or we're going to look for other inappropriate type issues. Define those search criteria in advance. The second is, and I've heard this thing before, especially with Alicia, is consistency. *When* are you doing this? Do you never do this for any candidate, but one candidate comes in and you don't quite like that feeling about them so you check social media. Well, you're treating that candidate differently. *Why* are you treating that candidate differently? That candidate may bring a discrimination claim and say, "I was treated differently *because* I'm a member of a protected class." So, are you going to do it near the end of the process or at the beginning of the process? However you do it, you need to do it consistently. If you are going to do it at the end of the process, or later in the process, and you've given a conditional offer but then say, "you know, we're not going to hire you," and then the person goes on LinkedIn and sees that you looked at the profile and they know why you didn't hire them; again, that gives them a reason to bring a cause of action against the company.

The best way that we have found to insulate the company from liability if they are going to do this is to make it a two-step process. You have somebody who does the searches. They are

[6] *Id.*

going to go on Google, they are going to go on LinkedIn, they are going to go on Facebook, and what's the purpose of the search? They're going on to verify employment history, to make sure that it matches up with the résumé, and to make sure there's nothing there that would make you as the employer question this person's judgment. Now, while going on, they see a whole host of other issues. They see that a person is putting on Facebook posts about how they were out on disability, or how they're disabled, or how they're having problems finding a job because they're over 40 . . . is that information that the screener, who is writing information down, is going to give to the decision maker? Absolutely not. This way, if they give a clean sort of history to the decision maker, and the decision maker is looking at what the person who is doing the search says, saying, "alright well, the employment history came out clean, we're going to hire this person," or, "all we see on here is that on their résumé they said that they were a former Vice President of the United States (and that's clearly not the case from looking on Google and Wikipedia and Facebook) and we're not going to hire this person" then that's it. If the person later sues the company and says, "Well you didn't hire me because you knew about my pro-union activity or you found out that I was over 40," the decision maker can hold up that piece of paper and say, "This is all I got, I didn't see that you were a member of any of the protected classes." And that should insulate the company from liability. So those are some concerns about if you're going to use social media in hiring, how to do it.

Alright, so, in we've heard a lot about protected activity and Facebook firings, and I thought I'd give you a little case study on it. It's Sunday morning. You make some coffee, toast up some bagels, settle in and check your e-mail and here you see a tweet by one of your employees (let's say you are general counsel for a company) and it says (of course, you work for ACME, which is very popular, ACME being the generic company*)*: "ACME sucks, the bastards won't pay more than minimum wage or give us health benefits . . . hey New York, wake up and make ACME do the right thing!" So, you go to the tweet and you notice five employees have re-tweeted it; a sixth one replied to the tweet as follows: "Hey teamsters, come on down." So on Monday morning you have the original tweeter terminated, the five re-tweeters, and the employee who replied to the tweet. Any concerns? Well, after hearing what you've heard today, you'd say, absolutely, that is protected concerted activity under the National Labor

Relations Act. You have employees that are reaching out and communicating with each other to improve the terms and conditions of employment and if you go ahead and terminate them for that, that is going to be a violation of the National Labor Relations Act. But I do invite you to put yourself in the shoes of the employer for a minute, looking at this. And especially, as Bill mentioned, if you're a non-union workplace, most non-union workplaces, you say, "the National Labor Relations Board," and they say, "What's that?" Or you say "NLRB" and they say, "What's *that?*" They're not aware that the National Labor Relations Board is focusing on them. Union activity and union membership in the United States has declined very rapidly in the past thirty years, to the point where now it's about seven percent where the private workforce is unionized.[7] The National Labor Relations Act has applied, historically, to both union and non-union workplaces, but it has only been in the last few years that the National Labor Relations Board has really started, there is no other way to put it than in advertising a marketing campaign to go out and let employees of non-union workplaces know that they can bring charges against their company if they feel that they've been retaliated against for protected concerted activity.[8] If you go on their website, they have a map which has instances highlighted, where if you scroll over them, it's instances where employees were terminated for speaking out about their terms and conditions of employment, and the NLRB came in and helped them get restitution, whether it was going back to work or some other back pay or something like that.[9] So, you put yourself in the position of the employer, you see something on social media, for everybody to see (on Twitter, on Facebook . . .) and you go, they're talking bad about the company. We can't have that, fire them. But now we're trying to educate employers that you can't do that with the media. If you see these postings, you have to make that determination: is this protected concerted activity or is it not? The case that Bill mentioned, about the car dealership, that's a case where there

[7] Press Release, U.S. Bureau of Labor Statistics–Division of Labor Force Statistics, Economic News Release: Union Members Summary (Jan. 24, 2014), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

[8] *Protected Concerted Activity,* NATIONAL LABOR RIGHTS BOARD, http://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last visited Jan. 27, 2014).

[9] *Id.*

were several different postings on Facebook. It was a case where it's a BMW dealership and they wanted to bring in customers (it's kind of like Huge-a-thon here) so they say, "We're going to serve lunch."[10] What do they serve for lunch at a BMW dealership? They serve hot dogs.[11] And so, this employee was taking pictures of the hotdogs and saying, "this is really cheap in terms of what we're trying to do to bring business here."[12] And *then* the employee posts a picture of a car that was driven into a fountain and it said, "this is what happens when you let a teenager take a test drive."[13] The company sees this and says, "these posts, they're public and they're bring our dealership into disrepute," and they fire the employee.[14] Now the interesting thing is that the National Labor Relations Board found that the posts about the car crashing into the fountain were not protected concerted activity.[15] That was clearly not protected concerted activity. It didn't rule on the issue of the hot dogs.[16] The administrative law judge *did* rule on the issue of the hot dogs and said *that* was protected concerted activity.[17] And how do you get to that train of thought? Posting about the hot dogs, saying 'these are cheap hot dogs,' leads to fewer customers coming in, which leads to fewer sales, which leads to fewer commissions, commissions equals wages in terms and conditions of employment and therefore, cheap hotdogs equal protected concerted activity. Again, interesting that the National Labor Relations Board didn't rule on this issue, but you can see in terms of how thin a line you can get, how tenuous a connection you can get between something being found to be protected concerted activity about wages and the terms and conditions of employment.

So, in terms of what we recommend for employers, in light of this recent activity is, ensuring that the company has a social media policy. Alicia mentioned that not a lot of companies have it and she is absolutely right. And they do need to have it, because they do need to give that notice to employees about what they should and should not be doing. And in terms of how broadly the

[10] Karl Knauz Motors, Inc., N.B.L.R., No. 13-A-46452, 2 (Sept. 28, 2011).
[11] *Id.*
[12] *Id.* at 2, 3.
[13] *Id.* at 3.
[14] *Id.* at 5.
[15] Karl Knauz Motors, Inc., N.B.L.R., No. 13-A-46452, 1 (Sept. 28, 2012) (Board Decision and Order).
[16] *Id.*
[17] Karl Knauz Motors, Inc., N.B.L.R., No. 13-A-46452, 8 (Sept. 28, 2011).

National Labor Relations Board has interpreted these issues, anything that an employee can construe as chilling their ability to have these discussions online is going to be found to be a violation of the National Labor Relations Act, including any disparaging remarks. So, if you want to have something in your policy about not having disparaging remarks, you have to be very, very specific about what types of remarks and showing that general remarks about the terms and conditions of employment are not going to be something that is prohibited by the social media policy. So, "anything that might damage the reputation of the employer," "inappropriate discussions," any broad language like that should not be in the policy; it needs to be out of the policy. The same with disclosure of confidential information or confidential personnel information. Same basis. The National Labor Relations Board construes this very broadly, and there have been cases on this saying that if you have in your policy "you can not discuss confidential information," an employee might read that and go, "well, my wages are confidential, so are you saying that I can't discuss my wages?" So you have to be very specific in terms of defining what is and what isn't confidential information.

On offensive, demeaning, abusive or inappropriate remarks, and I've gotten this question before: so if an employee comes up to me as a supervisor and says, "You're an absolute jerk. You don't pay us enough"; is that protected, concerted activity? The answer is, and I always love saying that the lawyer answer is, "it depends." It very well could be, because the employee is complaining about wages and conditions and terms of employment for himself and for other employees, and in calling the supervisor a jerk or perhaps even something more salty, that has been protected and has been found in some cases to be protected, even if they used profanity. So you have to be very careful about that in policies. Alright, I'll keep moving here. So that's in terms of firing, and we can talk about that a little bit more during the question and answer period, but I do want to get to a couple of more issues that you might not have thought about, in terms of social media.

One is, who earns a Twitter account? I've got a case study here. Your company makes computer accessories. You have a vice president of sales who wants to promote your products online. He checks with you about using that great company name, ACME, in the Twitter handle, and you agree. And ACME_Mike has

thousands of followers, tweeting about ACME's products, also tweeting about personal issues to sort of get that informal route of conversation going. Sales are strong. However, Mike suddenly leaves for a rival company, EMCA (which very creatively is ACME spelled backwards), and changes the Twitter account name to EMCA_Mike, keeping the thousands of followers that he had when he was ACME_Mike. What do you do? What do you do with that? Mike was there to develop the business, and got thousands of followers under ACME, leaves for the competitor and still has all of those followers. Assuming Mike doesn't have a non-competition agreement, can you do anything to Mike? Well, the interesting thing is that this isn't a hypothetical. This case actually happened, in the Northern District of California.[18] Kravitz joined the company in 2006.[19] Same deal. He was given the company's Twitter account.[20] He used the company name and his name on the account, and according to the company, when he left they asked for the account password back but he didn't give it to them.[21] He changed the name to just *his* name, kept tweeting and promoting other companies and not just PhoneDog.[22] According to Kravitz, they let him keep the account as long as every once in a while he would promote PhoneDog activities and they only sued after he said, "I want a portion of the revenue you are getting due to my tweets."[23] They claimed that his followers were a client list, something that was protected as their trade secret, as their confidential information, valuing it at $2.50 per follower per month, which added up to $340,000.[24] Unfortunately, we don't have a rule from this because the parties settled.[25] The only detail we know, the only public detail we know from the settlement is that Kravitz got to keep the account with all of those followers.[26] What we can learn from the lawsuit, in terms of what should the company have done in advance when they give

[18] PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612.

[19] *Id.* at *1.

[20] *Id.*

[21] *Id.* at *7.

[22] *Id.* at *1, *4.

[23] *Employer Sues Former Employee Over Ownership of Twitter Account*, NOLO: FOR ALL LAW, (Dec. 29, 2011, 4:16PM), http://blog.nolo.com/employment/2011/12/29/employer-sues-former-employee-over-ownership-of-twitter-account.

[24] *PhoneDog*, 2011 WL 5415612 at *3.

[25] *See* PhoneDog v. Kravitz, No. 3:11-cv-03474-MEJ, 2013 WL 207773 (N.D. Cal. Jan. 7, 2013) (agreeing to dismiss action).

[26] Fisher, Who owns your Twitter followers, you or your employer?, CNN MONEY, http://management.fortune.cnn.com/tag/phonedog-v-kravitz.

him a Twitter handle, what when they allow him to use a Twitter handle with the company name in it, they have some agreement in advance in terms of what happens when he leaves the company, what happens to the followers? Whose followers are they? Is there going to be some sort of compensation range? These are questions as attorneys that if you are representing companies that you're going to want to have answered in advance.

I have one other example here of a very recent case with LinkedIn.[27] It involves a woman who worked at EdCom.[28] At the company's encouragement, she created a LinkedIn account to promote herself and the company.[29] There was no policy.[30] All these problems, and again Alicia talked about this before, all of these problems come about when you don't define the rules in advance, when you don't have a policy and you're trying to come up with the rules after the fact. So, what happened basically is that the company was purchased and (she had given her password to an administrative assistant) they used her password, replacing the information on her profile with the new CEO.[31] And, so people that were looking for *her* on her LinkedIn profile would go to the new CEO's profile.[32] The profile had over 4,000 connections (which I find absolutely amazing in terms of a social media success).[33] Well she sued. She said, "They appropriated my name and my likeness."[34] Now the company prevailed on summary judgment on the federal claims including the Computer Fraud and Abuse Act.[35] And now, what that was, was her argument that "I didn't give consent for the company to use my password" and the company's argument was "You absolutely did, you gave your password to the administrative assistant and to a few others to be able to change it, recognizing that it was a company account and not your account."[36] So, therefore, EdCom prevailed on summary judgment on that

[27] Eagle v. Morgan. No. 11-4303, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013).
[28] *Id.* at *1.
[29] *Id.*
[30] *Id.* at *2.
[31] *Id.* at *3.
[32] *Id.*
[33] *Id.* at *4.
[34] *Id.* at *7.
[35] *Id.* at *6.
[36] *Id.* at *3.

count.[37] But *she* prevailed on the state law claims, on the unauthorized use of her name, on the invasion of privacy, and on the misappropriation of her likeness for publicity.[38] The interesting thing is that there were no damages.[39] How you do prove damages? Ryan and I were just talking about this a little bit beforehand, in terms of how do you prove damages for loss of reputation? If you don't prove any damages for that or you don't prove there was some injury to you, then you don't get any damages! So it's a very Pyrrhic victory, in that she won the case but didn't win any damages.

So having given these examples I wanted to give you one success story in terms of advising your clients correctly before the fact, and if you have that contract, if you have that policy, if you have that agreement in advance that the company owns this account, owns this likeness, owns this product, and if you leave, *we* have the ability to change the password, use the likeness, etc. Then you've defined it in advance and as long as they've agreed to it, you should be good to go. Okay, so the takeaways in terms of use of employer sanctions in social media accounts: you can control who is and who isn't authorized to speak as agents of the organization. This is a slightly different issue than another issue in terms of the National Labor Relations Board, and in terms of protected concerted activity. If I wake up in the morning and I see something on the Times Union's website, the Daily Gazette's website and (again let's just say I'm a general counsel at ACME) it's an employee speaking out against ACME saying "they don't pay us enough" and I go to terminate these employees, I can't do that. They're going to the media, it's on TU's website, it's on the Daily Gazette's website, they're engaging in protected concerted activity. They can talk to the media. That is different than giving them permission to say who can and cannot speak on behalf of the company. You, as the company, are allowed to say, "You are an authorized agent of the company, you are *not* an authorized agent of the company." So they can speak to the media and say, "Listen, we're not getting paid enough, we think we should be paid more." What they can't say is, "We're speaking on behalf of ACME, *we* don't think we're paying our employees enough." And so you want to put that in your policy, who can and cannot speak on behalf of the company. And if somebody purports to do that, to

[37] *Id.* at *5.
[38] *Id.* at *7–8.
[39] *Id.* at *5.

speak on behalf of the company or use the company's name in violation of policy, at that point you can terminate them and it shouldn't impact any other law. So you want to make sure that you have that in any agreements that you have.

As far as social media policies, again, coming from the employer's side of things, how we try to keep our clients out of hot water to begin with and avoid this. Really, success, your value as lawyers, it's not just winning cases; that's great but your value as lawyers is to try and keep your clients out of getting into those cases to begin with and again that comes from setting the rules, setting the policies in advance. To have social media policy, to address the limits on the use and the user at work, whose equipment can they use, can they use the employer's equipment, can they use their own cell phones, can they bring their own cell phones, their smart phones, into the facility to begin with, these are all things that you want to have in the policy. Addressing how to use the company name, logo, product photos, this is another issue that is a hot button before the National Labor Relations Board.[40] Employees are taking pictures of themselves engaging in protected, concerted activity and picketing, and maybe they're wearing a company shirt. There have been cases where people have been fired because, "You're wearing a company shirt, a company logo and that's against our policy to do that, you're fired." And that's where the National Labor Relations Board says, "Nope, not really, *they* are engaging in protected concerted activity and that trumps your right to a trademark." Now, it's a balancing act. If employees are putting out as part of their protest, let's say against Kentucky Fried Chicken's practices (or KFC now, they've been KFC for a while) . . . as part of a protest against KFC's payment practices they release the eleven herbs and spices recipe, alright, that's probably not going to be protected concerted activity. That goes to the heart of how KFC does business. But if it's a picture of an employee with a KFC logo, that's probably not going to be a case where the employer would win for firing the employee wearing that. In any policy, you want to make sure that you except out Section VII activities. Have a very clear disclaimer that nothing in this policy prohibits employees from talking about their terms and

[40] *See The NLRB and Social Media*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (discussing the NLRB's recent decision regarding the manner in which employers regulate employee use of social media sites).

conditions of employment. We talked about these things before and I want to make sure that we get to the question period and so I will leave it at that, thank you.