Employment Law Daily
March 18, 2014

Headlines

STRATEGIC PERSPECTIVES—"As You 'Like' It": Ascribing legal significance to social media

By David Scher, Principal, and R. Scott Oswald, Managing Principal, The Employment Law Group, P.C.

Introduction. Social media has become so pervasive that even the act of noting its pervasiveness has become an exercise as trite as maligning Congress. It should come as no shock then, that social media has begun to affect workplace interactions in a way that has legal significance.

The Fourth Circuit recently held that a Facebook "like" can be protected speech for First Amendment purposes. Combined with the National Labor Relations Board's ruling that a "like" can be concerted activity for the purposes of the National Labor Relations Act, the law is clearly recognizing Facebook as more than just a social distraction. The Internet is the new home of the marketplace of ideas, and a place where virtually everyone has a megaphone to voice everything from frustration with management, to unsafe working conditions, to suspected fraud.

Cases. In September 2013, the Fourth Circuit in *Bland v. Roberts* decided that a Facebook "like" can constitute protected speech for First Amendment purposes:

"Once one understands the nature of what Carter did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech. On the most basic level, clicking on the "like" button literally causes to be published the statement that the User "likes" something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

This interpretation is in keeping with the NLRB's approach to the same activity in the realm of labor law. The NLRB posts the following on its website:

"Using social media can be a form of 'protected concerted' activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not "concerted activity": what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management."

However, the NLRB has been willing to extend the protection only so far. On May 8, 2013, the NLRB issued guidance in 04-CA-094222, *Skinsmart Dermatology*, which noted that all Facebook activity is not equal, and that simple complaining about colleagues is not inherently protected concerted activity under Section 7 of the NLRA: "We conclude that the Charging Party's Facebook messages did not constitute protected concerted activity, as they did not involve shared employee concerns over terms and conditions of employment."

The takeaway from these decisions is that courts and administrative bodies are increasingly not looking to create bright-line rules based on certain types of conduct. After all, given social media's constant state of fluctuation, such an effort would be Sisyphean. Rather, decision-making bodies are looking to the context and even subtext of the social media interactions to determine what they actually *mean*.

"Liking." The message conveyed by a Facebook "like" seems clear-cut. The user reviews content and clicks a button that looks like a "thumbs up." Other users can now see both which users have clicked the

button, and how many have done so. Both the word and the image seem to convey approval of the content. However, this simplicity can be deceptive. Frequent users are often faced with a situation in which a friend posts a message or content that the original poster clearly finds upsetting or strongly disagreeable. What does a “like” mean here?

Suppose a user writes the following on Facebook as their “status”: “My boss is such a jerk. He never pays me overtime. Thinking about quitting.”

The status itself looks a lot like protected activity under the Fair Labor Standards Act. Courts here would likely turn to the rationale behind the “protected activity” concept, and look to see if the status was ever viewed by the employer. If the employer has seen the status or otherwise learned about it, it is hard to imagine courts would not interpret this as giving the employer notice of a complaint.

Then suppose another employee “likes” the comment, and the employer takes adverse action against that individual. Most would view a “like” of the status as encouragement to stand up to the boss and demand overtime, or to carry out the threat to quit and move on. Either way it would tend to be supportive of the original poster’s intent. It would stretch the bounds of credibility to argue that the person who clicks “like” actually supports the denial of overtime to the employee. Either way, if the employer had learned of the status and those who “liked” it, the protected activity intuitively feels a little more attenuated for the “liker” than for the original poster (or “OP” in Internet parlance). The critical issue in this hypothetical may turn out to be what action, if any, the employer took against the original poster.

Then suppose the boss views the status and decides to comment on it in a dismissive or unserious way. Then he or she may be responding to the protected activity inappropriately and strengthening the case that any later adverse action was partly caused by the protected activity. He or she could even be tacitly admitting to the underlying assertion.

It gets very messy very quickly when everyone can see what everyone else is doing. This demonstrates why employers and employees should be careful who from work they add as friends on Facebook, and pay attention to features that allow them to limit who sees the content they post. At some point, judges and juries may be looking at these interactions and gleaning meaning from them, deciding whether to metaphorically push their own, significantly more powerful “like” buttons.

“Tweeting” and “retweeting.” Having established that the Facebook “like” is not as simple as it may appear at first blush, Twitter presents even murkier waters. Twitter is unique from Facebook in part because the user cannot limit who sees posts. Whatever a user says is there for all the Internet to see, with only 140 characters to convey everything they want to say.

Twitter allows users to “favorite” tweets, which is akin to a Facebook “like.” More interesting, however, is the concept of “retweeting.” This is when user 1 intentionally displays the tweet of user 2 on user 1’s feed. Anyone who follows user 1’s feed will then see user 2’s post. This goes to the heart of the “viral” concept that has made Twitter such a hotbed for sociopolitical activity, most famously in recent political revolutions in the near east. Unsurprisingly, the retweet has employment implications as well.

Imagine a nurse sees a tweet linking to an article about Medicare fraud in hospitals and retweets it. Other employees of the same hospital see the article and retweet it, and the article goes “viral” (an apt expression in this context). Later, the hospital is investigated for a substantially similar type of fraud to that discussed in the article. The first nurse is subject to an adverse action during or after the investigation.

Was the retweeting of the article protected activity? Normally, to retweet an article does not necessarily convey approval of the content, but rather simply expresses the idea that you think others would find it interesting. In this case, our nurse was correct — other nurses did find it interesting and retweeted it, though the original nurse offered no commentary and did not suggest an investigation of her own hospital.

The original tweet of the article link does not intuitively feel like protected activity, but once a groundswell surfaces, it starts to take on a different characterization. Our nurse is no longer just a reader with an interest, but rather the progenitor of a movement. When the investigation occurs, even if it was entirely independent of the tweets, the employer might still ascribe fault to the employee. It is easy to imagine how closely the facts of such a situation would need to be argued in order to make the claim clear for judges and juries to understand. A retweet means something; a set of retweets means something else. It will behoove employees and employers to obtain at least a surface level understanding of the language and significance of Twitter.

"Checking in." Probably the least known of the social media outlets described here, Foursquare is a location-based service that allows users to "check in" at a particular establishment or place. It will inform the user if other friends are present, and users can sometimes earn points, incentives, rewards, discounts, etc., for checking in at locations.

The simplest description of the message the Foursquare user conveys is "I am at this place." Yet again, the message may take on a different type of significance in certain contexts. Imagine that a few employees of a factory get together at a local bar to discuss the possibility of unionizing. If more than one of them check in to the location on Foursquare, it begins to look something like the kind of gathering and interaction that the NLRB read into Facebook "likes." It conveys that multiple employees convened in a particular location, presumably with "some relation to group action."

Simply checking in at a bar appears innocuous, as the employees might simply be there for food and drink. But an employer must still be careful how he or she reacts to the activity.

One can also imagine situations in which the location where an employee "checks in" could itself convey some kind of protected activity. For instance, imagine an employee "checks in" at or near the local or state office for human rights. An employer that sees that and recognizes the location may be aware that the employee has filed or is considering filing a complaint of discrimination.

Conclusion. We will continue to see a body of law developing as to different types of social media activity and the activity's implications for speech at and away from work. As young people continue to filter into the labor market and more older employees wade into the waters of social media, the share of employees who frequently use social media outlets is large and growing. Likewise, employers continue to find ways to use social media for business purposes. Moreover, new modes of social media emerge constantly, and other current outlets, such as Pinterest and Instagram, raise similar concerns. (Does pinning a historic photo of the Pullman strike on one's "American history" board mean something different than an AFL-CIO blog post supporting a walk-out by Walmart workers on one's "Organize!" board?)

As these trends converge, the social media universe becomes both bigger in terms of the number of users, and smaller in the sense that it becomes more likely that any two users will run into each other either intentionally or inadvertently. The law will necessarily need to grow and adapt to this interconnected world, and to a world where mobile computing makes personal and work life harder to distinguish from one another.

Most of the above examples raise more questions than can be addressed here, but the takeaway is to think harder about what social media interactions actually *mean* for employees and for employers. It may seem easy to shake a fist at the kids on the lawn and dismiss all of it as the newest revolution in wasting time, but that approach could leave rogue managers or employees to their own devices, which will result in trouble farther down the line. Likewise, a decision to engage via social media, either as an employer or as another employee, carries its own risks and rewards. In either case, it is important at all times to consider what a social media interaction, or even a lack thereof, will look like to an outside party.

By David Scher, Principal, and R. Scott Oswald, Managing Principal, The Employment Law Group, P.C.

MainStory: IndividualRights LaborNews LitigationNewsTrends PracticeTip

Follow Us

WorkDay Blog | Twitter | Facebook

Get Our Apps

iPad | iPhone | BlackBerry | Android | Kindle

Related Products & Services

Labor and Employment Law Integrated Research Library | Employment Law Daily Archives