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Social Media in the  
Workplace  
Should we really  
care?

Robert McKinley

“We lived in farms, then we lived in cities,  
and now we’re going to live on the internet.”  
*-Sean Parker*



# World Population By Country

1. China
2. India
3. FACEBOOK
4. United States
5. Indonesia
6. Brazil
7. Pakistan
8. Nigeria
9. Bangladesh
10. Russia

## March 2012

- Facebook had over 901,000,000 active users
- LinkedIn had over 161,000,000 folks, with two new members every second
- Twitter had 140,000,000 users
  - 340,000,000 tweets per day

# So, just what is this monster called “Social Media?”

Wikipedia says:

- Social media refers to the means of interactions among people in which they create, share, and exchange information and ideas in virtual communities and networks. Andreas Kaplan and Michael Haenlein define social media as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content.” Furthermore, social media depends on mobile and web-based technologies to create highly interactive platforms through which individuals and communities share, co-create, discuss, and modify user-generated content. It introduces substantial and pervasive changes to communication between organizations, communities, and individuals.

# Like It or Not, Here's What's Happening

## 1. Employees use it while at work

- Work computers
- Laptops
- PDAs
- iPhones
- iPads
- Tablets
- Cell phones

## 2. Many employers encourage its use

- Over  $\frac{3}{4}$  of Fortune Global 100 Firms have a Twitter account
- Over half have a Facebook page
- Over half utilize YouTube
- Over  $\frac{1}{4}$  have a corporate blog
- Many encourage their employees to use their personal social media outlets to promote the business

# Why Do We Care? What's All the Uproar About?

Let's look at some real world social media posts-



## Twitter Post 10/2/2010

“I’m downtown eating, surrounded by Mormons and repressed sexual energy.”

## Tucson, Arizona Shooting- Congressman Gifford Shot, Several Killed

Following the memorial service, their comments about the Native American prayer service:

- “[It] was apparently some sort of Yaqui Indian tribal thing, with lots of references to the ‘creator’ but no mention of God. Several of the victims were, as I understand, quite religious in that quaint Christian kind of way (none, to my knowledge, was a Yaqui).”

“Obama’s gma even knew it was going 2 b bad! She died 3 days b4 he became President.”



## Watching the Workforce

- 17 percent of businesses disciplined an employee in 2009 for violating blog or message board policies.
- Nearly 9 percent reported terminating an employee for such a violation
  - Twice as many as in 2008
- 13 percent investigated exposures through messaging or Twitter

## Ok, We Know Social Media can Create Embarrassment What are the Legal Ramifications?

1. Sexual Harassment/Hostile Environment
2. Often protected categories
  - A. Age
  - B. Race/color
  - C. Sex
  - D. Pregnancy
  - E. Religion
  - F. Disability
  - G. National origin
3. Veterans
  - Sexual orientation
  - Domestic partner
  - Credit history (FCRA)
  - Criminal convictions
  - GINA
  - Invasion of Privacy

## Sexual Harassment – Hostile Environment

To establish a sexually hostile environment, the conduct or statements must:

- Be because of gender,
- Be unwelcomed,
- Be severe or pervasive, and
- Substantially affect the victim's ability to perform his or her job.



## Sexual Harassment – *Quid Pro Quo*

Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission is made a term or condition of an individual's employment, or
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting the individual, or
- The individual fears it will be used against him or her.

## How Does Social Media Factor in to These Already Existing Areas?

“[Text] messaging is the most revealing of the true thoughts – the unrestrained thoughts of the harasser...they bang it out real quick, late at night, after a couple glasses of wine. They don’t think twice about it. And they make big mistakes...”

– “Textual Harassment’ on The Rise”

*The National Law Journal*, July 20, 2009

# What About “Cyber Bullying”?



# Let's Talk For A Moment About Using Social Media in the Hiring Process

Several years ago common to go “on-line” to see what you could find out about an applicant- No telling what you might find-

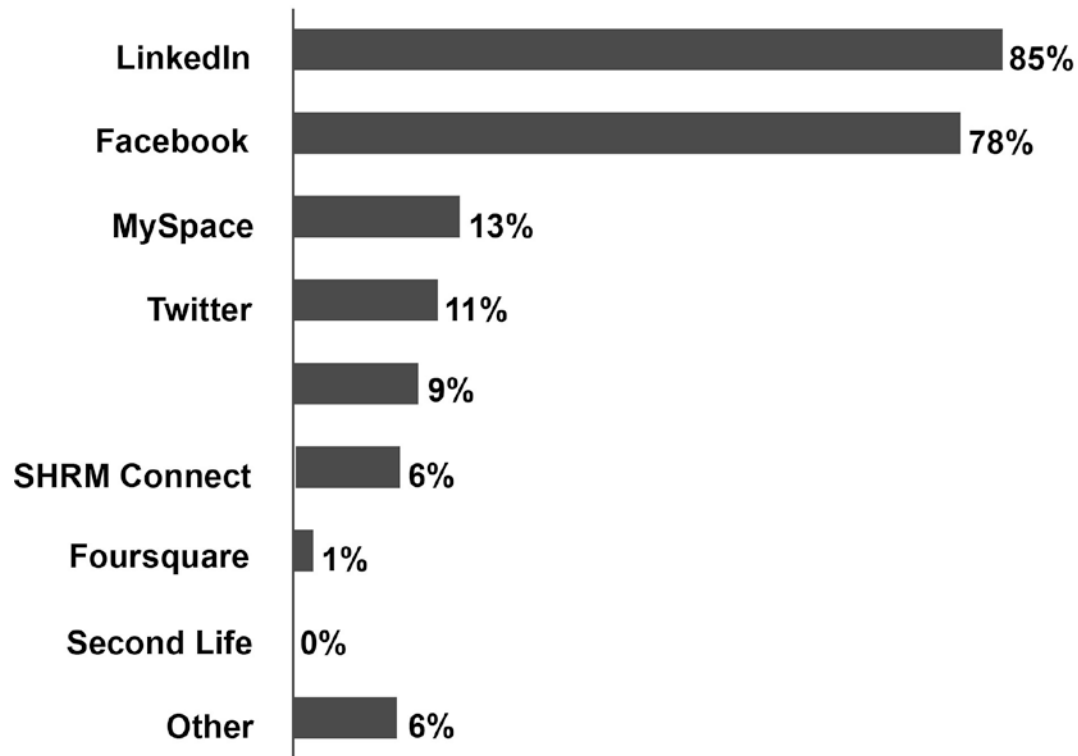
- MBA candidate post picture of drunken revel – Iowa State Basketball coach

Still ok?

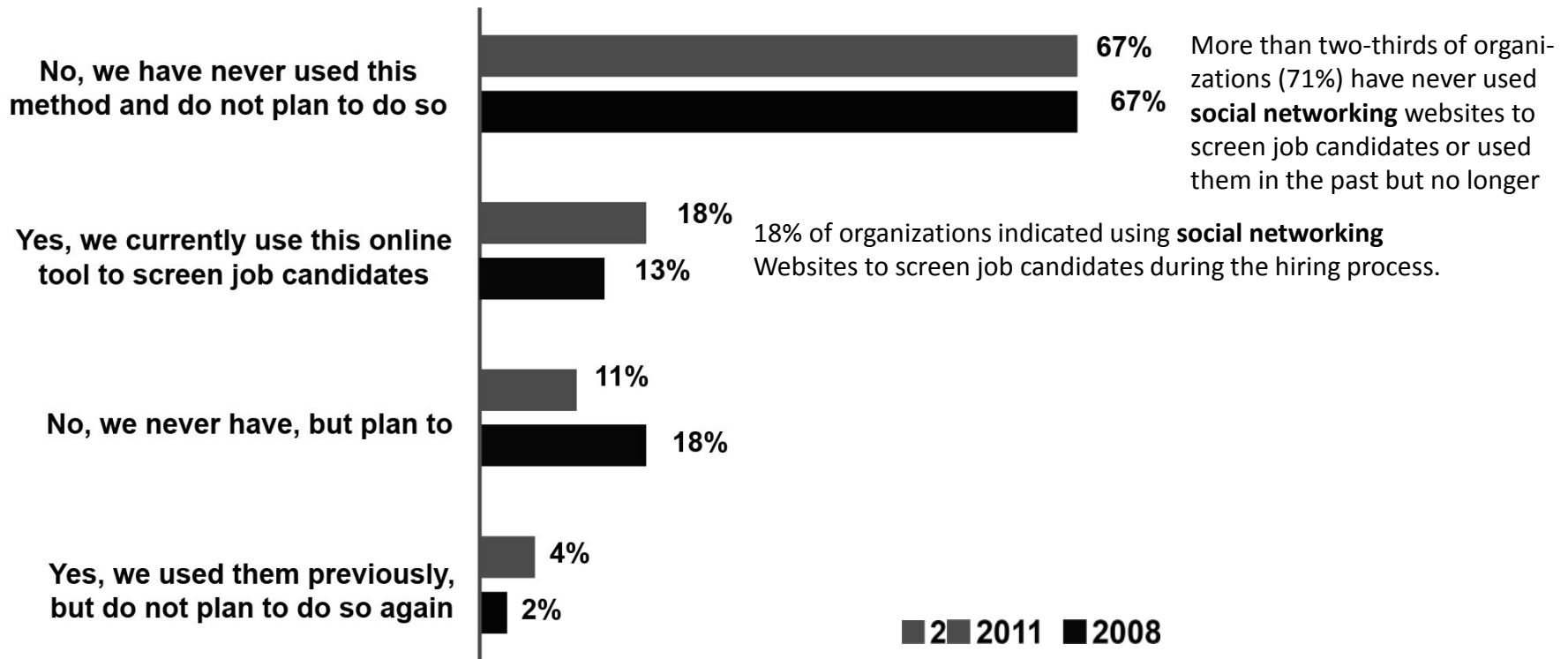
Think about this?

1. Go online, find wedding picture –  
-spouse of another race, or the same sex.  
May not impact on your decision, but if don't hire, at least they have something to talk about and probably will get to trial if they file lawsuit
2. GINA issue

## The Most Common Social Networking Websites Organizations Use to Screen Job Candidates

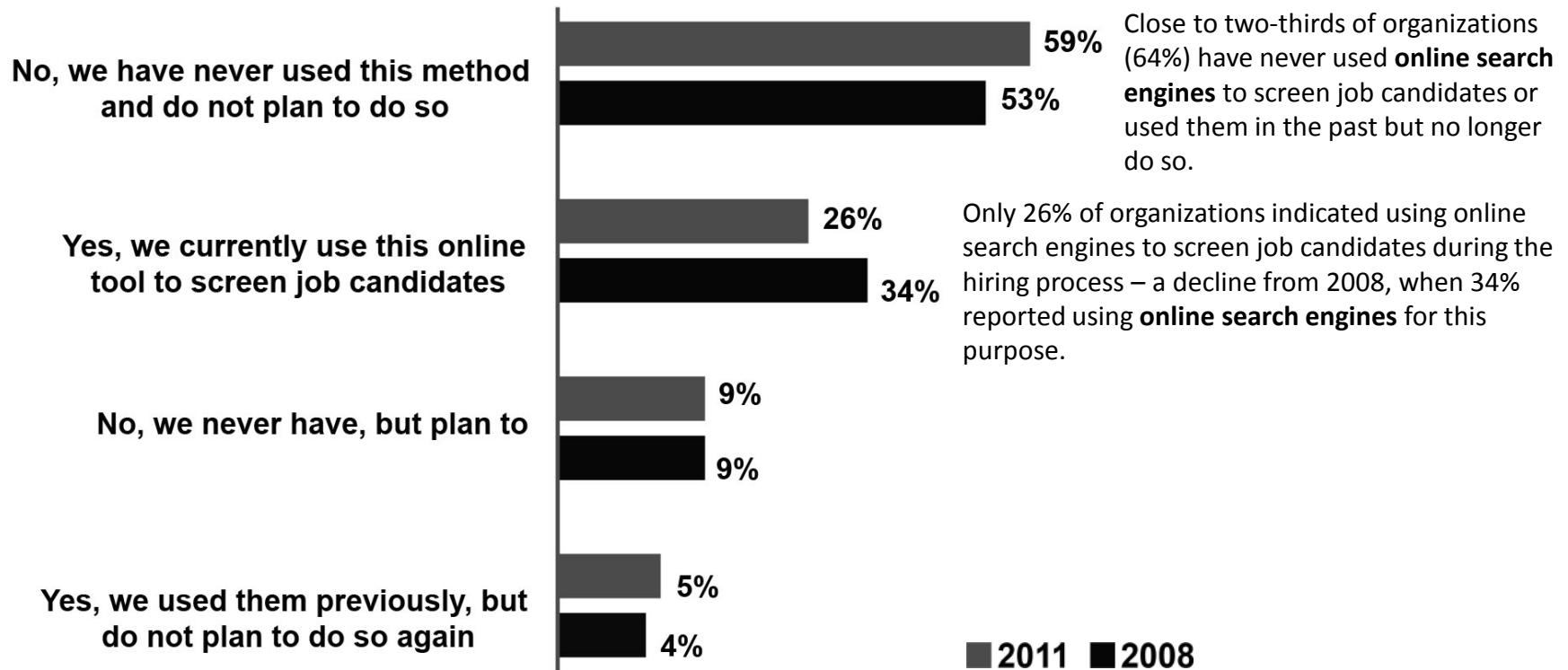


## Has Your Organization used Social Networking Websites to Screen Job Candidates at any Point in the Hiring Process, or Does it Plan to Do So?

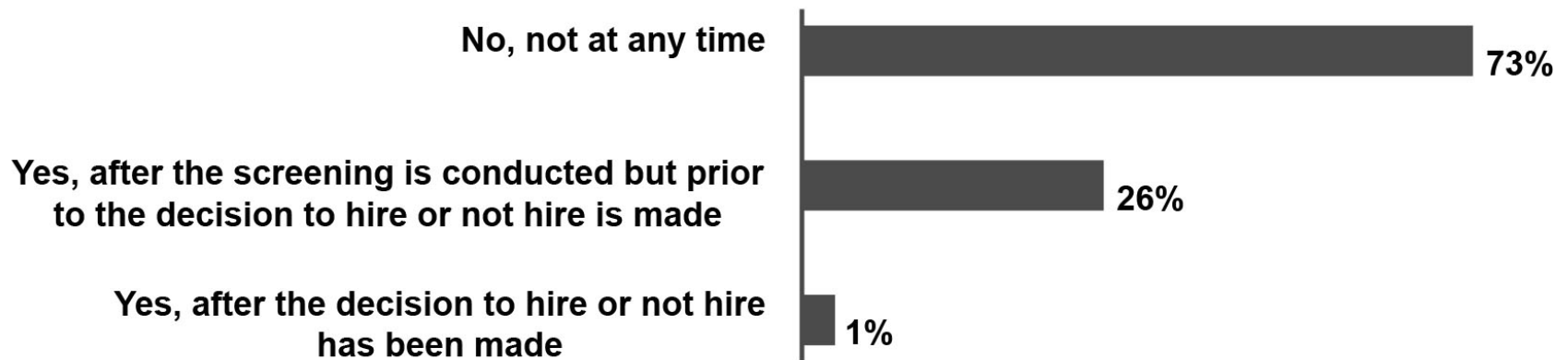




## Has Your Organization Used Online Search Engines to Screen Job Candidates at any Point in the Hiring Process, or does it Plan to do so?



## Does Your Organization Allow Job Candidates the Opportunity to Explain Questionable Information that was Found on Social Networking websites?



## Why Does Your Organization Not Use Social Networking Websites to Screen Job Candidates?

	2008 (n=337)	2011 (n=461)
A concern about legal risks/discoervering information about protected characteristics (e.g., age, race, gender, religious affiliation)	54%	66%
Inability to verify with confidence the information from an applicant's social networking page	43%	48%
Information about job candidates taken from these sites may not be relevant to their work-related potential or performance	36%	45%
Not all job candidates have information on social networking sites	*	34%
Concerns about invading the privacy of job candidates	40%	33%
Information about job candidates taken from these sites may not be relevant to whether they are a good fit for the organization	26%	33%
It takes too much time and effort in relation to information gained	19%	17%
Job candidates might be less likely to apply if they knew the organization screened job candidates in this manner	9%	7%
Not applicable; my organization does not screen job candidates in any manner whatsoever	4%	4%
Other	16%	8%

most common reasons organization do not use social websites for screening.



- How many of you are on Facebook? LinkedIn?
- Have you ever posted anything about what goes on at work?
- Are any of you “friends” with anyone at work?
- Are any of you “friends” with everyone at work?

Again, let's look at a couple of scenarios

## What If?

- Office Casanova chronicles, on his own time, opinions of female co-workers he dates on Facebook, calling one co-worker, without naming her, “a snore” before the updates spiral into more explicit comments. A female co-worker believes he’s talking about her and complains.

## What If?

- Co-workers form Facebook group to gossip negatively about another co-worker.



## What If?

- A white manager is only “friends” with white employees in the department?
- A male supervisor has a history of being “friends” with attractive single women in the office.
- An employee gets upset because a supervisor won’t be “friends” with him or her – and claims it is discrimination.

## Social Media Sites Could Disclose Protected Activities

- Protected Activities/Complaints
  - Discrimination/Harassment Complaint
  - NLRA/RLA – Union Activities
  - Common Law “Whistle Blowing”
  - Work Comp History
  - Political Affiliation
  - Military Status
  - Protected Leaves
  - Off-duty lawful alcohol/tobacco use
- Bankruptcy filings/credit difficulties
- Criminal Convictions

## The Dominos Pizza Example

- North Carolina franchise employees
- Criminal Charges
- Dominos' response
- Patrick Doyle, new CEO
- “You will absolutely continue to see us be honest and transparent with people,” he said. “This is a huge change with our business.”

# Risks to Employer from Employee Conduct

- **Hostile Work Environment**
  - When postings contain sexually inappropriate, otherwise discriminatory communications
- **Discrimination Claims**
  - Proof of preference/discriminatory animus when Supervisor makes comments about protected status
- **Defamation**
  - When employees posts negative statements about another employee, customer/client or competitor



## Risks to Employer from Employee Conduct

- Trade secrets and intellectual property disclosure/infringement
  - Disclosure of certain trade secrets or IP can destroy (or at least erode) the “confidential” status of the information
  - Employee’s use of someone else’s IP may constitute “infringement”
    - Proven by e-trail
- Erosion of Restrictive Covenants
  - LinkedIn “Connections” = “Client List”?
  - Facilitates restricted post-employment “solicitation”

## Risks to Employer from Employee Conduct

- Trade libel
  - Misstatements or misrepresentations about a competitor could lead to claims of trade libel.
- Securities fraud, gun-jumping, and insider trading
  - Communications made during black-out periods
  - Other communications that might affect stock price
  - SEC is monitoring tweets, etc.

## FTC/Endorsement Guidelines

- Ann Taylor Loft FTC Investigation (Jan 2010)
- Collection Preview;
  - Bloggers offered gift cards
- Sign posted advised bloggers to disclose gift card incentives
- Some did not

# FTC/ Endorsement Guidelines

- **Result: No Enforcement Action**
  - First and only such event
  - Few bloggers commented
  - Several did disclosures
  - Later Adopted Policy helped



# Risks to Employers from Employee Conduct

- Child Pornography
  - Federal law, and many states, MANDATE reporting to law enforcement once discovered
  - Missouri statute renders IT professionals (among others) mandatory reporters
  - DO NOT DESTROY OR COPY
  - Turn over to authorities ASAP
    - Sooner out of your control and off premises the better
- Limit Reviews
  - Every copy or review may constitute another “distribution” of child pornography and another victimization of child
  - Not to mention HWE

## Employer Overreaction?

- Ashley Payne (Georgia) – High school teacher fired for posting picture of alcohol consumption while on vacation.
- School board saw pictures on Payne’s Facebook page of her sipping beer and wine.
- Trip to the Guinness Brewery in Ireland while on vacation.
- “I did not think that any of this could jeopardize my job because I was just doing what adults do and have drinks on vacation and being responsible about it.”
- Sued the school district in November, 2009

## Employer Overreaction?

- In May, 2010, City of West Allis, Wisconsin fired a police dispatcher of 21 years, Dana Kuchler.
- Posted that she was “addicted to vicodin, adderall, quality marijuana, MD 20/20 grape and absinthe” on Facebook page.
- Kuchler claimed she was joking and union claimed the punishment was too harsh.
- Arbitrator: 30-day suspension without pay.
- City has appealed.

# The Penumbra of Privacy in the Workplace

## Recent Cases regarding Employee Privacy:

- City of Ontario v. Quon (U.S. 2010)
- Stengart v. Loving Care Agency (N.J. 2010)
- United States v. Szymuskiewicz (7<sup>th</sup> Cir. 2010)
- Others



## Tips for Employers

- Adopt a practical policy suitable for the business.
  - Example: IBM's Social Networking Policy
- Absolutes are usually hard to enforce, and bad policy
- Disseminate and Discuss.
- Expect and Use Good Judgment.

Before we talk about some solutions, let's talk about the current hot topic in this area.

How many of you work for an employer that is unionized?

Probably not all that familiar with the NLRB –  
National Labor Relations Board

*Well, that is about to change -*

## The NLRB

- Federal Agency headquartered in Washington, D.C.
- Has a five member governing board, but the majority is determined by the party in power
  - (thus, politics occasionally enters the picture)
- Has the authority to investigate, adjudicate and sue you to enforce their orders.

## The NLRB

- NLRB is tasked with protecting employees who engage in “consensual activity” from being discriminated against by their employer.
- Section 7 of the National Labor Relations Act states:  
“Employees shall have the right to self-organize, to form, join or assist labor organizations, to bargain collectively through organizations, to bargain collectively through representatives of their own choosing, and to engage in other consented activities for the purpose of collective bargaining or other mutual aid or protection.”



- Translating this, the cases hold employees have the right to:
  - Discuss, comment on, complain about, adjust, change their wages, benefits and working conditions
  - Express concerns about how they are treated, employee discipline and discharge issues and other matters relating to their terms and conditions of employment

## A New Sheriff in Town...

- It is the primary government employment related agency which is addressing the rights of employees and employers regarding social media.
- It is getting very aggressive (historically) in taking actions to increase employee rights.
- It is encouraging employees (even non-union employees) to file unfair labor practice charges related to social media discipline.

## So, what can they do, really?

- Remedies available to the NLRB if you have committed an Unfair Labor Practice:
  - Requiring you to cleanse their record of discipline;
  - Requiring you to reinstate them;
  - Requiring you to pay them back pay;
  - Requiring you to post a notice to employees; and
  - Court injunctions

Keep in mind the Act (NLRA) covers private sector employees, union employees, non-union employees, for profit and not for profit

Also keep in mind the NLRB equates conversation over a beer at the local pub, water cooler conversation and on-line context all the same



## 2 Big Problem Areas

- 1) Disciplining employees for what the employer deems negative comments
- 2) Overly broad (from the NLRB perspective) handbooks

## Acting Grand Counsel has issued 3 reports on social media

- August 18, 2011
- January 24, 2012
- May 30, 2012

## So what is the biggest issue?

- Policies which the NLRB feel are too broad.
  - Example: “Employees should not make disparaging remarks about the company, their supervisors, etc. on social media websites, blogs or any other form of electronic media.”
- Drafting tip?
  - If you must have a policy addressing comments, make sure it is limited to trade secrets, confidential information about the company or customers, and information which if released would breach agreements the company has.

## You Make the Call #1

- Five employees do not like their co-worker. They believe the co-worker is a slacker and fakes illnesses to get out of work. They post derogatory messages on her Facebook page containing obscenities and openly expressing their negative feelings toward her. The victim complains. Following an investigations, the five employees are discharged for harassment under the company's zero tolerance policy. Any problem with the discharges?



## You Make the Call #1

- Most likely. Recently, an administrative law judge of the Board held that the five employees were engaging in concerted protected activity for which they could not be discharged
- The judge held the Facebook postings were no different than “water cooler” talk and could not be interfered with. He held that even though the conversations were not directed to the employer, because they involved terms and conditions of employment they were protected.
- An administrative law judge ordered the employees reinstated.

## You Make the Call #2

- Employer is an ambulance service. Employer had a policy prohibiting disparaging comments when discussing the company or an employee's superiors. An employee is asked by a supervisor to prepare an incident report about a customer complaint about the employee. The employee asked for a union representative to be present during the preparation of the report. She did not get the union rep. Employee goes home and makes a negative post about her supervisor on her personal Facebook page which drew supportive comments from co-workers and further negative comments about the supervisor. Employee is fired. Was this permissible?

## You Make the Call #2

- According to the NLRB, no. The policy prohibiting negative comments was unlawful as likely to prohibit an employee from engaging in lawful activity.
- The NLRB further found that a discussion about an employer's refusal to comply with an employee's Weingarten right and discussing a supervisor on Facebook was protected activity.
- The termination was unlawful.

## You Make the Call #3

- Employer is a restaurant with an unwritten policy that waitresses don't share tips with the bartenders even though the bartenders help serve food. A bartender discussed the issue with a co-worker who agreed that it "sucked." Several months later in Facebook posts, the bartender complained to a relative that he was doing waitresses work without the tips. He called the restaurant's customers "rednecks" and said he hoped that they choked on glass as they drove home drunk. He didn't discuss the posting with co-workers and none of them responded. The owner sent a Facebook message to the employee telling him his services were no longer needed. Was the termination lawful?



## You Make the Call #3

- According to the NLRB, yes. Although the postings concerned terms and conditions of work, the employee did not discuss the posting with co-workers and none of them responded to the posting. There were no employee meetings or any attempt to initiate group action concerning the policy.
- The termination was lawful.

## You Make the Call #4

- Employer was a retail store operator. Employee was a customer service employee. Employee posts on Facebook critical comments about a new Assistant Manager. Employee noted “tyranny” at the store and that the Employer was going to get a wake up call when people quit. Co-workers posted asking why he was “wound up.” Employee responds by calling the Assistant Manager a “super mega puta” and complained about discipline. One co-worker posted a “hang in there” kind of comment. Store Manager gave the employee a one-day suspension which prohibited promotion for 12 months. Was the discipline lawful?
- “Tyranny” is defined as oppressive power.

## You Make the Call #4

- According to the NLRB, yes. The postings were expressions of an individual's gripe. They expressed only frustration with his individual dispute and did not contain language suggesting group action. The suspension was lawful.

## Practical Takeaway

- Social Media Policy / Handbooks
  - Have one
  - Make it practical and suitable for your organization
    - IBM
    - INTEL
    - KODAK
  - Absolutes are usually hard to enforce and generally are bad policy
  - Disseminate and discuss
  - Expect (and use) good judgment
  - Be specific – Reasonable Employee Standard
  - Provide Examples
  - Specifically identify confidential and trade secret information as prohibited from disclosure



## Don'ts

- Broad prohibitions which could interfere with rights to criticize the company
- Vague prohibitions that might confuse employees
- Require permission before making posts or comments
- Rely on savings clause without reviewing NLRB reports and cases

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