

SOCIAL NETWORKING IN THE WORKPLACE

Due to the ever-expanding universe of technology, an increased dependence on the Internet and the growth of social networking sites such as Facebook, MySpace and Twitter, a new problem has emerged for employers- employees who use social networking sites to publicize job-related problems. It is no surprise that this recent trend has led to disciplinary action against employees, with the employer primarily justifying its disciplinary decision as a business necessity. An employee who spends his or her time at work logging onto the internet for non-work related reasons is misusing company resources and thus not being a productive employee.

Terminated employees who were terminated for posting comments (blogging) on social networking sights have claimed wrongful termination, alleging that the employer invaded their right to privacy. However, courts have generally found this argument unpersuasive. Courts have held that when an employee posts a message on a social media site which can be seen by any member of the public, that individual has a diminished expectation of privacy. Information publicly available on the Internet is not a “private” forum. Hence, an employee cannot possess a reasonable expectation of privacy, especially when that employee does not take any precautionary measures to screen his or her audience.

In California, “privacy” is considered an “inalienable right” guaranteed by Article 1, Section 1 of the California Constitution. Due to this explicitly enumerated right, the California Supreme Court has held that the scope of protection granted by the state’s constitution is often greater than the scope of the U.S. Constitution’s unenumerated right of privacy. In California, conduct alleged to be an invasion of privacy is evaluated based on the extent to which it furthers legitimate and competing interests. Therefore, the employee’s individual right to privacy must be balanced with the competing interests of the employer.

Generally, if an employer can link the employee’s conduct to job performance, the employer can likely take disciplinary action based on “legitimate business needs.” If an employee posts a negative message related to the workplace, the legitimate business interests of the employer will likely outweigh the privacy interests of the employee. It is essential for the employer to protect its work environment and similarly maintain a good reputation.

Consider the following cases in which the employee was terminated because of what he or she posted on the Internet:

- ❖ In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the U.S. Supreme Court upheld the termination of a police officer who was fired after he sold videotapes of himself stripping out of a police uniform. The court ruled in favor of the police department, holding that employees could be fired for actions that are “detrimental to the missions and functions of the employer.”
- ❖ In *Dibble v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008), the Court of Appeals held that a police officer’s First Amendment rights were not violated where he operated a

website featuring sexually explicit photographs and videos of his wife. The court reasoned that he engaged in conduct which might bring discredit to the City and that his position in the sexually explicit website business was not compatible with his position as a police officer.

- ❖ In *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008), a teacher in Connecticut was fired after uploading inappropriate content to a MySpace page he used to communicate with students. The court upheld the termination, explaining that the web page raised serious doubts about his ability to do the job.

Based on recent decisions, employers are now recommended to describe what constitutes permissible and impermissible conduct in the workplace. For example, employers are urged to give their employees fair warning, through a clear written policy or a terms of use agreement, indicating the type of conduct that may lead to termination. As many of the recent cases indicate, an employer who implements policy and procedures regarding the use of technology will likely prevail in the event an adverse employment action is later brought by an employee.

If you are an employer and have not warned your employees of the consequences of blogging, you are missing the opportunity to protect your legal interests and avail yourself of the opportunity to take disciplinary action for such conduct. If you need assistance in creating such a policy or if you want further information, please contact Larry Kazanjian at lkazanjian@pkwhlaw.com or (916) 442.3552.