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Multinational Employers Face Multiple Facebook Rulings

Recent prosecutions by the National Labor Relations Board have the employer community all atwitter over the Board's apparent social media policy. While social media law is too new and undeveloped to give a clear picture, the Labor Board's approach appears to give employees broad latitude to disparage their employer on Facebook and similar social media sites – viewing the online exchanges more like water cooler conversations among coworkers than public broadcasts to actual or potential customers.

Early indications are that foreign tribunals are taking a different approach. In several recent cases, they have affirmed the employers' right to dismiss employees for comments made in social media forums.

One recent example involved Kristy Preece, a bar associate (acting as shift manager) at a pub in Runcorn, England. After tossing out a pair of unruly customers (apparently not an exceptional occurrence in the pub business) and fielding some nasty phone calls from the unhappy customers, she took to her cell phone and started a conversation with her Facebook friends, in which she shared her (highly uncomplimentary) opinion of the customers involved. Although she later claimed that she thought her Facebook conversation was limited to a few dozen of her close friends, the exchange actually reached a much wider audience, including the now-very-offended customers in question and their daughter, who filed a complaint with the employer.

The pub involved was part of a large chain, with over 800 outlets and a detailed employee handbook. Although not quite up to the latest in mobile phone technology, the corporate policy did deal with blogging, and specifically noted that employees were subject to disciplinary action for creating or contributing to a blog that "lowers the reputation of the organisation, staff or customers." A manager was dispatched to investigate the customer complaint, interviewing and taking written statements from her and another employee. This led to a disciplinary hearing before another manager, with a written statement of the charges against her. Finding a violation of the Internet policy, the manager dismissed Ms. Preece. This decision was appealed to yet another manager, who upheld the dismissal.

Ms. Preece then turned to the Employment Tribunal, contending that her dismissal was unfair, in violation of the Employment Rights Act 1996. The Tribunal concluded that the employer had reasonable grounds to find that the employee had breached the Internet policy by making abusive and inappropriate comments about the unruly customers, notwithstanding the provocation they had afforded her, and had thus engaged in gross misconduct which justified her dismissal. The Tribunal acknowledged the employee's "right to freedom of expression" under the Human Rights Act 1998, but rejected that as a

basis to render the dismissal unfair "in view of the risk of damage to the reputation" of the employer. *Preece v. J.D. Wetherspoons Plc.*, Employment Tribunals Case No. 2104806/10 (2011).

A similar result was reached by the British Columbia Labor Relations Board in Canada. For more than a month, in the midst of a union certification proceeding, the employer monitored the Facebook postings of two employees who took to the site to air highly uncomplimentary, profanity-laced and aggressive comments about their supervisors, and the company generally. In addition to assorted name-calling and vague threats, the Facebook postings also called the employer "crooks" who were "out to hose [customers]." A month after the union was certified, the company fired the employees "for making disrespectful, damaging and derogatory comments on Facebook" which were "likely to damage the reputation and business interests of the Employer." The union filed charges, accusing the employer of dismissing the employees because of their union activities.

The Labor Board rejected the union's claims. Notwithstanding the absence of a social media policy, the hearing officer concluded that the employees' Facebook comments fell outside the scope of legal protection because they were both public and private. The postings that expressly disparaged the employer's services and business were not protected because they were broadcast to hundreds of Facebook friends, eliminating any "expectation of privacy," and they were "damaging to the Employer's business." Those "offensive, insulting and disrespectful comments about supervisors or managers" also were unprotected, because they were "akin to comments made on the shop floor" and as such constituted insubordination. Accordingly, the union's charges were rejected. *Lougheed Imports Ltd.*, BCLRB No. B190/2010 (2010).

The law is too new, and the sample size too small, to draw any definitive conclusions from these cases. They suggest, however, that it would be prudent for multinational employers to review their policies on the use of social media sites (or to put policies in place if they do not yet have any). Where possible, expectations of privacy should be defined, particularly with respect to conduct occurring during work time and comments that are widely disseminated. The use of social media sites to disparage the employer's customers, products and services should be addressed, as well as conduct that would be prohibited in the workplace, such as insubordination. As with any multinational HR policy, local rules (both substantive and procedural) should be considered.

Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

Bettina B. Plevan
212.969.3065 – bplevan@proskauer.com

Aaron J. Schindel
212.969.3090 – aschindel@proskauer.com

Howard Z. Robbins
212.969.3912 – hrobbins@proskauer.com

Yasmine Tarasewicz
33.1.53.05.60.18 – ytarasewicz@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Jeremy M. Mittman
310.284.5634 – jmittman@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Daniel Ornstein
44.20.7539.0604 – dornstein@proskauer.com

Ying Li
852.3410.8088 – yli@proskauer.com

Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris | São Paulo | Washington, DC

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