The Intersection Of Social Media And Employee Rights In The Workplace

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Introduction[1]

The law on employee use of social media as well as employer-owned electronic equipment is rapidly evolving. The dynamism of the communications tools themselves – as well as the changing social norms they generate – has made it hard for the courts to keep up. The Supreme Court has recognized that this is an area where new law is likely to be made based on shifting workplace customs:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. Prudence counsels caution...***Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior...At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.***[2]

I. The Fourth Amendement Applies To Electronic Surveillance In Public Sector Workplaces

In this era of severe budget cuts as well as high-profile union-busting tactics by various State and Local government officials, public sector workplaces have continued to be in the spotlight. It should not be surprising, then, that social media issues arising out of the public sector have taken center stage in the national debate about how best to handle the ever-evolving issues.

A. The Supreme Court Tackles Sexting But Fails To Establish What Is A "Reasonable" Expectation of Privacy

In *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010), the Supreme Court considered the case of a police officer who was disciplined for sending sexually explicit text messages – referred to as "sexting" – and sending excessive numbers of personal text messages on work time. The Supreme Court established that the essence of the constitutional test under the Fourth Amendment is an inquiry as to whether the public employee has a reasonable expectation of privacy in his or her workplace electronic communications.

In *Quon*, the Supreme Court observed that two different tests had been applied previously in its decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987): (1) a case-by-case inquiry as to whether an employee has a reasonable expectation of privacy and, if so, whether the employer's intrusion on that expectation for work-related purposes was reasonable under the circumstances (the plurality opinion) or (2) a categorical rule that the Fourth Amendment applies to public employees with the caveat that employer searches deemed reasonable in the private sector context do not violate the Fourth Amendment in the public sector context (the Justice Antonin Scalia concurrence).[3]

The Supreme Court in *Quon* declined to decide which test governed. Instead the Supreme Court assumed that the employee had a reasonable expectation of privacy but found no violation of the Fourth Amendment under the facts presented.[4]

In *Quon*, the City owned, issued, and paid for the pager used by the officer to send text messages, and the City's subscription contained a monthly character limit above which the City incurred overage charges.[5] The City explained its search of the officer's text messages by stating that it was seeking to determine if the City's plan allowed for enough characters per month so that employees were not being forced to pay for work-related expenses or, alternatively, that the City was not paying for extensive personal communications.[6]

In reaching its decision, the Supreme Court reasoned that the City's policy on use of electronic equipment reserved the right to monitor all network activity, including e-mail and internet usage, and notified employees about no expectation of privacy or confidentiality when using such City resources.[7] While the policy did not apply to text messaging on its face, the employer communicated to employees that it would treat text messages the same way it treats

e-mails.[8] Notably, the Supreme Court found that the employer's practice of permitting employees to pay for their own overages, instead of auditing employee use, may arguably have restored an expectation of privacy in the messages sent.[9]

Even assuming that the officer had a legitimate expectation of privacy in his text messages sent on the City-issued pager, however, the Supreme Court held that the search was reasonable because it was necessary for the non-investigatory, work-related purpose of determining whether the City's plan allowed for enough characters per month.[10] The Supreme Court also held that the scope of the search was reasonable because it was an efficient way to determine whether the officer's overages were the result of work-related messaging or personal use.[11]

At a practical level, the Supreme Court's decision turned on the reluctance to make law in this area because of the fast-changing social and technological trends:

> A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to decide this case on narrower grounds.[12]

Thus, the Supreme Court charted a course of case-by-case decision-making to allow for cases to follow, not lead, the evolution of technology and corresponding social practices.

B. Recent Decisions Dealing With The Quon Quandary Created By The Supreme Court Provide Greater Clarity – Sort Of

Following the Supreme Court's lead, Federal district courts have attempted to articulate practical principles to apply the Fourth Amendment in public sector workplaces on a case-by-case basis.

1. The Fourth Amendment inquiry evaluates reasonableness on a case-by-case basis, considering factors such as whether the employer has disseminated a clear policy regarding electronic monitoring, the justification for the electronic surveillance, and the scope and intrusiveness of the search

In *Carter v. County of Los Angeles*, the court relied on *Quon* for the proposition that warrantless searches in public employment need to be of appropriate and limited scope.[13] In that case, the employer installed secret video cameras in response to an anonymous tip concerning misconduct by 1 employee.[14] These cameras were not used solely when the employee under suspicion was on duty, however, and they recorded other employees as well.[15] In fact, the employer reviewed the videotape for possible wrongdoing by any employee, not just the employee who was the subject to the anonymous tip.[16]

The court in *Carter* held that the search was not justified from its inception because the employer did not limit the scope of its search to employees suspected of misconduct as the employer had in *Quon*.[17] The court also emphasized that the employer never informed employees that they would be subject to videotaping.[18] By contrast, the employer in *Quon* warned employees that their pager use could be subject to employer audits.[19]

In *Ciralsky v. Central Intelligence Agency*, the plaintiff was terminated from employment with the Central Intelligence Agency ("CIA").[20] Among other claims, the plaintiff alleged that the CIA monitored communications on his employer-provided laptop.[21] Relying on *Quon*, the court reasoned that the monitoring at issue occurred to determine if the plaintiff could continue to be trusted with access to national security information.[22] The court held that this was a legitimate work-related purpose and, therefore, rejected the Fourth Amendment claim.[23]

In *Alexander v. City of Greensboro*, the court held that a plaintiff alleging an employer improperly placed a keystroke logger on the employee's computer plausibly stated a Fourth Amendment claim.[24] The employer allegedly had a policy prohibiting searching e-mails without probable cause, and the purported purpose of the keystroke

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logger was to obtain the employee's e-mail password, access the employee's e-mail account, and download e-mail messages. The court concluded that it was not clear the employer had a legitimate purpose for downloading the e-mail messages and, consequently, a plausible claim could be stated alleging the installation of the keystroke logger was unreasonable.[25]

2. In the absence of clear precedent, courts may turn for guidance to Fourth Amendment jurisprudence developed in the criminal context

In *Brookshire v. Buncombe County*, the employer – without the employee's knowledge – installed a Global Positioning System ("GPS") device on the plaintiff employee's county-owned work vehicle in response to suspicion that the plaintiff was not attending to work duties during the day.[26] This device tracked and recorded the location of the vehicle over the course of the day; the employer then compared this information to the employee's time sheets and computer log-ins.[27] This information ultimately caused the plaintiff to resign.[28]

Citing *Quon* for the proposition that the Fourth Amendment applies in the context of public employment, the court ruled that the plaintiff had no reasonable expectation of privacy with respect to the location of his work vehicle during the work day.[29] The court relied primarily on criminal law precedent, holding that GPS monitoring of a vehicle is not a search within the meaning of the Fourth Amendment in light of the observable nature of an individual's movements in a vehicle generally.[30]

II. Private Sector Legal Trends Have Bent Toward Protecting Employees, Which Should Be Instructive To Public Employers

In the private sector, the National Labor Relations Board ("Board") has taken the initiative to extend labor law protections to employee activities using social media – even beyond unionized workplaces. For example, the Board has issued employee-protective decisions that recognize broad rights for employees to speak out publicly regarding their workplace conditions using Facebook, among other social media platforms.

The private sector cases should be relevant in the public sector because Minnesota courts generally follow decisions under the National Labor Relations Act ("NLRA")[31] when interpreting the Public Employment Labor Relations Act ("PELRA").[32] This is particularly true here where there is an absence of precedent under Minnesota law. Moreover, arbitrators in public sector cases follow trends in private sector Board law because those trends reflect the changing norms of the workplace – that is, the evolving common law of the shop.

A. The National Labor Relations Board Is Now Aggressively Protecting Employee Rights To Use Social Media In Advocating About Their Terms And Conditions Of Employment

The Board has applied Section 7 of the NLRA to expand employee protection from employer searches that interfere with the ability to act in concert "for mutual aid or protection."[33] In *Hispanics United of Buffalo*, for example, the Board addressed an employer's decision to discharge non-union employees for criticizing their supervisor on Facebook.[34] The supervisor objected to the Facebook commentary, claiming it made her feel bullied and slandered.[35] Nonetheless, the Board considered the activity to be concerted activity for mutual aid or protection within the meaning of Section 7 because the employees were challenging their supervisor's treatment of them in the workplace.[36]

Likewise, in *Costco Wholesale Corp.*, the Board found that the employer violated the NLRA by maintaining rules prohibiting electronic communications, including via

[1] An earlier version of this appeared in the 2013 Public Sector Labor & Employment Law Institute manual.

[2] City of Ontario v. Quon, 130 S.Ct. 2619, 2629-30 (2010) (emphasis added).

[3] Quon, 130 S.Ct. at 2628.

[4] Id. at 2630-33.

[5] Id. at 2625.

[6] Id. at 2626.

[7] Id. at 2625.

[8] Id.

[9] See id.

[10] See id. at 2631.

[11] Id.

[12] Id. at 2630.

[13] See 770 F. Supp. 2d 1042 (C.D. Cal. 2011).

[14] See id. at 1046.

[15] See id.

[16] See id.

[17] See id. at 1050-51.

[18] See id.

[19] See id.

[20] See 2010 WL 4724279 (E.D.Va. 2010).

[21] See id. at *6.

[22] See id.

[23] See id.

[24] See 762 F. Supp. 2d 764, 806 (M.D.N.C. 2011).

[25] See id.

[26] See 2012 WL 136899 (W.D.N.C. 2012).

[27] See id. at *2.

[28] See id. at *2-3.

[29] See id. at *3 (citing Quon 130 S.Ct. at 2627).

[30] See id. at *3-4 (citing United States v. Knotts, 460 U.S. 276 (1983)).

[31] See 29 U.S.C. §§ 151, et seq.

[32] See Minn. Stat. §§ 179A.01, et seq.; see also In re Rosemount Educ. Ass'n, 461 N.W.2d 215, 218 (Minn. 1990); Op. Engr's Local 49 v. City of Minneapolis, 233 N.W.2d 748, 752 (1975) ("In interpreting provisions of the PELRA, it is often instructive to refer to decisions interpreting the National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151 to 168.").

social media, that "damage the Company, defame any individual or damage any person's reputation..."[37] The Board held that this policy violated Section 7 because it could reasonably be read to prohibit employee communications protesting their treatment as employees.[38]

The Board's Office of the General Counsel recently issued a Memorandum explaining the Board's broad interpretation of protected, concerted activity through social media and, moreover, providing examples of how employer policies can violate Section 7.[39] The Board specifically criticized Minnesota's own Target Corp. for stating in the employee handbook that an employee can only share information with a coworker when "someone else needs to know."[40] At www.nlrb.gov/concerted-activity, the Board posted its analysis of how employees can act together for their mutual aid and protection through social media while covered by the NLRA.

B. Legal Developments In The Private Sector Developments May Very Well Dictate How Social Media Use And Employee Rights Intersect In The Public Sector

Given the similarities between the Federal law governing private sector workplaces and the State law governing public sector workplaces, decisions in the private sector context are highly instructive when evaluating social media issues in the public sector.

1. The Public Employment Labor Relations Act

PELRA does not contain an identical provision to Section 7 that protects the right of employees to act together for "mutual aid or protection." However, PELRA does contain a potentially analogous provision recognizing the right of employees to express views, grievances, complaints, or opinions about their terms and conditions of employment:

> **Subdivision 1. Expression of views.** [PELRA does] not affect the right of any public employee or the employee's representative to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative. [PELRA does] not require any public employee to perform labor or services against the employee's will.
>
> If no exclusive representative has been certified, any public employee individually, or group of employees through their representative, has the right to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, by meeting with their public employer or the employer's representative, so long as this is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.[41]

PELRA also includes a provision that makes "interfering, restraining, or coercing employees in the exercise of the rights guaranteed in" PELRA an unfair labor practice.[42]

2. The Minnesota Supreme Court

PELRA's Expression of views provision quoted above could reasonably be interpreted as akin to Section 7 of the NLRA – that is, a broad recognition of the right of employees to speak about their terms and conditions of employment. The Minnesota Supreme Court has suggested, however, that the intent of the Expression of views provision quoted above is primarily to make clear PELRA does not limit any rights granted by other sources of law.[43] Importantly, the Minnesota Supreme Court also recognized in the same decision that public employees have the affirmative right to express their opinions about

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[33]See 29 U.S.C. § 157.

[34]See 359 NLRB No. 37 at *1 (2012).

[35]See id.

[36]See id. at *2-4.

[37]See 358 NLRB No. 106 at *1-2 (2012).

[38]See id. at *2.

[39]See generally Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59 (May 30, 2012).

[40]Id.

[41]See Minn. Stat. § 179A.06, Subd. 1.

[42]See Minn. Stat. § 179A.13, Subd. 2(1).

[43]See Finch v. Wemlinger, 310 N.W.2d 66, 68 (Minn. 1981) ("We do not read this section as conferring any additional right on public employees but rather as a taking note of the existence of rights outside the PELRA which the legislature in no way intended to limit by the creation of new rights in the Act.").

[44]See Finch, 310 N.W.2d at 68-69, citing Ekstedt v. Village of New Hope, 193 N.W.2d 821, 826-27 (1972) (emphasis added).

[45]193 N.W.2d at 823-24, 827.

[46]Id. at 824-25.

[47]Id. at 825-26.

[48]Id. at 826-27.

[49]Id. at 827.

[50]Finch, 310 N.W.2d at 68-69.

[51]363 N.W.2d 126, 129-130 (Minn. Ct. App. 1985).

[52]See id.

[53]See id. at 128.

[54]See id.

[55]See id.

[56]See id. at 129-30.

[57]See I.S.D. No. 625, BMS No. 12-PA-1031 at *6 (Kapsch, 2012).

[58]See id. at 10.

[59]See id. at 10-11.

[60]See id. at 14.

[61]See id. at 32-33.

[62]See id. at 33.

[63]See id. at 37.

[64]See Minneapolis Park & Rec. Board, BMS No. 11-PA-0382 at *3 (Schiavoni, 2011).

workplace terms and conditions without facing discharge or discipline, as long as the means of expression can be "***characterized as grievances***."[44]

In *Ekstedt*, the Minnesota Supreme Court held that the president and vice president of the union were protected in expressing their views outside of prescribed grievance procedures through union "resolutions."[45] The two respondents had prepared resolutions that they submitted to a police sergeant along with a request that they be sent to the mayor and the village council, and copies were also provided to the news media.[46] The resolutions criticized a police sergeant, the village manager, and the administration.[47]

The Minnesota Supreme Court found that the resolutions related to terms and conditions of employment, could be "characterized as grievances," and therefore constituted protected activity for which the officers could not be discharged under a predecessor to the Expression of views provision.[48] In short, the *Ekstedt*, decision defines "grievance" broadly as "some complaint related to terms or conditions of employment" such that it could arguably apply to conduct similar to Section 7 concerted activity.[49] Significantly, the Minnesota Supreme Court evidently cited *Ekstedt* as good law in a subsequent case even after the language of the statute had been amended to approximate its current formulation.[50]

Similarly, in *Marshall County Educ. Ass'n v. I.S.D. No. 441*, the Court of Appeals recognized that employees have an affirmative right under the Expression of views provision to express or communicate a "grievance" without being subject to discharge or discipline.[51] Citing Ekstedt, the court reasoned that the term "grievance" must be liberally construed.[52] The employee in that case, a teacher, had filed a grievance related to negotiation of her contract that was later withdrawn.[53] In that regard, the employee later informed the school that she would accept certain contract terms but would not discuss anything further without her representative.[54] The employer then decided not to renew the employee's contract.[55]

The court in *Marshall County* held that the employee's negotiations for which she was terminated "arose out of" her previously withdrawn grievance and, consequently, her termination violated the Expression of views provision.[56] Such analysis offers a solid foundation for extending PELRA protections to employee advocacy using social media and other electronic communications, particularly if those communications are addressed to management or relate to a grievance filed against an employer.

[65] See id. at *13.

[66] See id.

[67] See id. at 13-14.

[68] See id. at 15.

[69] See City of Winona, BMS No. 07-PA-0610 at * 3 (Jay, 2007).

[70] See id. at *7-8.

[71] See id. at *24.

[72] See id. at *20-21.

[73] See id. at *22.

[74] See id.

[75] See 125 LA 1473 (Baroni, 2009).

[76] See id. at 1473.

[77] See id. at 1476-77.

[78] See 129 LA 1519 (VanDagens, 2011).

[79] See id. at 1521.

[80] See id.

[81] See id. at 1525-27.

[82] See id.

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III. The Application Of The Just Cause Standard In A New Technological Climate Presents Challenges and Opportunities

As use of social media and the internet becomes pervasive, arbitrators are adapting the longstanding common law of the shop to accommodate. The questions that frequently arise in discipline or discharge cases include whether particular off-duty social media use has an adverse impact on the workplace, whether social media use violates a clearly disseminated employer policy, or whether personal use of employer equipment for social media purposes is appropriate.

As arbitrators consider these cases, the trends in private sector labor law that expand the scope of employee rights – which have been widely covered in the mainstream media – may have a decisive role in shaping the development of the common law of the workplace.

A. Employer Allegations About The Misuse Of Employer Technology Or Equipment Has Generated Mixed Results

In *I.S.D. No. 625*, the grievant was a 15-year employee with a consistent record of positive performance reviews but who was discharged for inappropriate use of the employer's e-mail and internet system.[57] While investigating another employee for inappropriate use of e-mail, the employer discovered that the grievant had used his employer e-mail account for adult dating services.[58] Some of the e-mails were sexually explicit.[59] Thus, the grievant was terminated for inappropriate use of the employer's e-mail system.[60]

In denying the grievance, the arbitrator concluded that the grievant had adequate notice of the employer's e-mail policy, which was posted and generally available to employees.[61] The policy explicitly prohibited using the employer's e-mail and internet system to access sexually explicit material. Furthermore, the arbitrator noted that accessing pornographic material using an employer's equipment constitutes serious misconduct even in the absence of a policy specifically prohibiting such conduct.[62] The arbitrator concluded that misuse of an employer's technology resources is generally considered a serious offense and, therefore, just cause existed for the discharge.[63]

In *Minneapolis Park & Recreation Board*, the grievant was terminated for, among other things, conducting an eBay business on work time using a work computer.[64] Although the grievant admitted occasional use of his work computer to access eBay for personal purposes, there was also evidence that the grievant sometimes accessed eBay for work purposes.[65] The employer's policy permitted limited personal use of employer technology that did not interfere with an employee's duties.[66]

At the hearing in *Minneapolis Park & Recreation Board*, both sides presented expert testimony concerning the amount of time the grievant spent using his work computer for personal eBay business.[67] Because the employer failed to carry its burden concerning the amount of allegedly improper usage, the arbitrator concluded that the grievant's limited personal use did not warrant discipline.[68]

In *City of Winona*, the grievant was the president of the local union.[69] The City gave the employee an 11-page written reprimand that focused on the employee's unauthorized misuse of City e-mail for non-City business, specifically union business.[70] The arbitrator sustained the grievance, ordering the City to remove the reprimand from the record and to permit the union to communicate freely with employees.[71]

The arbitrator in *City of Winona* relied on contract provisions which granted the union permission to communicate with its members during work hours and on work premises.[72] The arbitrator also noted that, even absent contractual protection, the City had asked those who participated in the relevant committee to communicate in a similar fashion with their respective groups.[73] In sum, the mere fact that the grievant did not agree with management about the plan in question did not transform his sharing the information via e-mail into a misuse of employer equipment.[74]

B. Off-Duty Use Of The Internet And Social Media Generally Has Not Been Protected

In *Phoenix City Board of Education*, the arbitrator sustained the cancellation of an elementary school teacher's contract on the grounds of immorality.[75] The school had received an anonymous package in the mail from "concerned parents" containing pictures of the grievant from an adult dating site.[76] Because nude and semi-nude photos of the grievant were on websites accessible by anyone, the arbitrator concluded that the school was justified in cancelling the grievant's contract on the basis of a potential adverse impact on students.[77]

In *Vista Nuevas Head Start*, a head start teacher was discharged for off-duty negative comments made on Facebook about work.[78] The grievant had created a private Facebook group including herself and co-workers.[79] The grievant and other members used the group to complain about work, co-workers, parents, and students.[80] Because the commentary consisted of "mere griping" and used vulgarity and derogatory language, the arbitrator considered the speech private and capable of undermining work relationships.[81] Consequently, although the speech occurred outside of work and outside working time, it supposedly contained a sufficient nexus to the workplace to justify termination.[82]

Conclusion

The law's treatment of social media use in the workplace, especially in the public sector, is in a state of flux. Given the similarities between the Federal statutory regime that applies to the private sector and the State statutory regime that applies to the public sector, the more clearly established Federal precedent offers a window to the future for both private sector and public sector employees. In this context, legal analysis flowing from the Fourth Amendment and Section 7 should continue to provide protection for employees in many cases – albeit under a case-by-case approach.