The Rapidly Evolving Law Governing Employment-Related Expression by Employees

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Introduction[1]

The freedom of expression has long been considered to be one of the nation's most important civil liberties.[2] In this age of reportedly widespread domestic surveillance by the National Security Agency and other government agencies—and the aggressive prosecution of whistleblowers by the Obama Administration—some employers might think that it would be permissible to discipline or discharge employees for being outspoken. In particular, such employers may believe that they can punish employees when those employers strongly disagree with the employees' expression. As explained below, however, such adverse action could trigger legal liability for employers because the law protects many forms of employment-related speech even when it upsets employers.

I. The Protection of Employee Expression Appears to be Expanding in the Private Sector

Employees working for private businesses, at least in theory, have a number of statutory vehicles for potentially seeking redress if their employers take adverse action in response to employee speech activity. The nature of, and circumstances surrounding, employee expression largely dictate whether particular speech will be deemed protected.

1. The National Labor Relations Act Protects Employee Speech Whether Or Not The Workplace Is Unionized

The National Labor Relations Board ("Board") has applied Section 7 of the National Labor Relations Act ("NLRA") to enhance protection from employer interference with expression that seeks concerted action with other employees "for mutual aid or protection."[3] Importantly, Section 7 governs whether or not the workplace is unionized and whether or not the employee(s) involved are union members.

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.[4] The supervisor objected to the Facebook commentary as slanderous and bullying.[5] Nonetheless, the Board considered the social media postings to be concerted activity for mutual aid or protection within the meaning of Section 7 because the employees were challenging their treatment in the workplace.[6]

Likewise, the Board found in ***Costco Wholesale Corp.*** that the employer violated the NLRA via rules prohibiting electronic communications which "damage the Company, defame any individual or damage any person's reputation..."[7] The Board held that this policy violated Section 7 because the policy could reasonably be read to prohibit employee communications protesting their treatment as employees.[8]

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.[9] 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."[10]

2. Whistleblower Statutes Provide Protection To Employees Whose Conduct Brings Them Within The Scope Of Those Laws

An employee's communications, including on social media, may be protected by one of many whistleblower statutes, including the following:

- ***Minnesota Whistleblower Law, Minn. Stat. § 181.932***—prohibits employers from retaliating based on an employee's good faith reporting to the employer or government a violation, suspected violation, or planned violation of legislatively, administratively, or judicially established law— even if an employee's job duties required such reporting;
- ***Sarbanes-Oxley Act, 18 U.S.C. § 1514A***—prohibits publicly traded companies from retaliating based on an employee's reporting of conduct he or she reasonably believes constitutes a violation of specified Federal anti-fraud statutes, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any Federal law relating to fraud against shareholders; and

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[1]An earlier version of this article, which was jointly prepared by the author with Mary Thomas (in-house employment counsel at Best Buy), appeared as part of the manual provided for the employment law conference sponsored by Minnesota CLE and held in Minneapolis in August 2013.

[2]*See, e.g.*, U.S. CONST., AMEND. I.

[3]29 U.S.C. § 157.

[4]359 NLRB No. 37 at *1 (2012).

[5]*Id.*

[6]*Id.* at *2-4.

[7]358 NLRB No. 106 at *1-2 (2012).

[8]*Id.* at *2.

[9]*See generally* OFFICE OF THE GENERAL COUNSEL, DIVISION OF OPERATIONS-MANAGEMENT, MEMORANDUM OM 12-59 (May 30, 2012).

[10]*Id.*

[11]*See, e.g., Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000) ("We have not held specifically that the way in which an employee presses complaints of discrimination can be so disruptive or insubordinate that it strips away protections against retaliation. But we see no reason why the general principle would not apply, even when a complaint of discrimination is involved."); *Kempcke v. Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998) (stating that a court must consider whether oppositional conduct was so disruptive, excessive, or inimical to, the employer's interests as to be beyond the protection of the Age Discrimination in Employment Act's anti-retaliation provisions).

[12]*See* 832 F. Supp. 2d 147, 151 (D. Conn. 2011).

[13]*Id.*

[14]*Id.* at 151-52.

[15]*Id.*

[16]*Id.* at 154-55.

[17]*Id.* at 155.

[18]*Id.* at 155-56.

[19]*Id.*

[20]*Id.*

[21]*Id.* at 156.

[22]363 N.W.2d 126, 129-130 (Minn. Ct. App. 1985).

[23]*Id.*

[24]*Id.* at 128.

[25]*Id.*

[26]*Id.* at 129-30.

- *Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u 6*—a violation of the securities laws to the SEC or participating in an SEC proceeding or investigation.

3. Anti-Discrimination Statutes Also Protect Employees Whose Actions Bring Those Employees Under The Purview Of The Anti-Discrimination Statutes

Most anti-discrimination statutes have provisions prohibiting employers from retaliating against employees for their protected activities: complaining about, participating in the investigation of, or opposing alleged discrimination. Those statutes include the following:

- *Title VII, 42 U.S.C. § 2000e-3(a)*—prohibits employers from retaliating based on an applicant or employee's opposition to discriminatory practices, filing of a charge, or participation in an investigation, proceeding, or hearing relating to alleged discrimination;

- *Age Discrimination in Employment Act, 29 U.S.C § 623(d)*—prohibits employers from retaliating based on an applicant's or employee's opposition to discriminatory practices, filing of a charge, or participation in an investigation, proceeding, or hearing relating to alleged discrimination; and

- *Minnesota Human Rights Act, Minn. Stat. § 363A.15*—prohibits retaliation based on a person's opposition to a discriminatory practice or because the person filed a charge, or testified, assisted, or participated in an investigation, proceeding or hearing related to alleged discrimination.

Otherwise protected conduct can become unprotected, however, if expressed in an unreasonably disruptive or insubordinate manner. [11]

4. Computer Privacy Statutes Offer A Further Degree Of Protection For Employee Expression

In a quickly changing legal environment, statutes at both the State and Federal level are being adopted to address the proper handling of computers and, by extension, electronic expression by employees. Those statutes, which can be used to challenge employer overreach in monitoring or interfering with employee speech, include the following:

- *Stored Communications Act, 18 U.S.C. § 2707*—prohibits intentionally accessing, without authorization, a facility through which an electronic communication service is provided; the computer systems of an email provider, a bulletin board system, or an internet service provider are examples of facilities covered by the this law; and

- *Electronic Communications Protection Act, 18 U.S.C. §§ 2511, 2520*—prohibits intercepting wire, oral, or electronic communications, with some exceptions.

II. The Protection of Employee Expression also seems to be Increasing in the Public Sector, Especially in Relation to Social Media

In recent years, employee speech in the public sector has been the focus of both high profile legislative battles, such as that instigated by Wisconsin Governor Scott Walker, and by controversial Supreme Court cases, such as *Knox v. SEIU*, Local 1000, 132 S.Ct. 2277 (2012). Employee expression has not been silenced, however, particularly with the proliferation of social media platforms.

1. The Explosion Of Social Media Usage Has Triggered More Robust Protection Of Employees Under The First Amendment Of The Constitution

Since the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006), employees have generally had more difficulty establishing that work-related speech is Constitutionally protected because such expression has often been considered

part of the employees' official duties as opposed to speech about a matter of public concern.

In the social media context, however, the courts have appeared reluctant to consider employee expression as undertaken pursuant to employees' official duties instead of to address a matter of public concern. A recent case exemplifies the apparent trend in favor of employees.

In *Ricciuti v. Gyzenis*, the plaintiff drafted a proposed schedule to help alleviate the city police department's budgetary woes.[12] The plaintiff investigated scheduling changes to help address budget issues, at the request of the interim chief of police, but the plaintiff also prepared an analysis of what she considered to be unnecessary overtime worked by supervisors.[13] The plaintiff shared this analysis with co-workers and acquaintances, including a former city official and vocal critic of the police department.[14] The police department investigated and then fired the plaintiff, in part, because of the information she shared and because, due to the plaintiff's analysis, there were "blogs and emails circulating that were critical of the MPD."[15]

The court considered the information that the plaintiff shared to be a matter of public concern even though it also arguably dealt with the plaintiff's own dissatisfaction with her terms and conditions of employment.[16] Because the information in question related to mismanagement within the police department allegedly resulting in the wasting of city funds, however, the court concluded that the speech addressed a "paradigmatically" public concern.[17]

The more difficult question, according to the court, was whether the employee expression was part of the plaintiff's official duties, and, thus, not subject to First Amendment protection under *Garcetti*.[18] Although the plaintiff had been asked by management to research scheduling issues, the information she shared with the public had a different focus in the eyes of the court: supervisors and their schedules rather than department-wide scheduling.[19] The court also found relevant that the plaintiff prepared the data shared with the public largely on her own time and at her own initiative.[20] In addition, it seemed important to the court that the plaintiff distributed the information to friends, family, and local officials.[21]

2. In The Social Media Context, State Labor Law Offers The Promise Of Broad Protection Analogous To That Under Federal Labor Law

Strictly speaking, the propriety of social media usage by public employees has not been explicitly addressed under the Public Employment Labor Relations Act ("PELRA"), the NLRA's State analog for State employees. Minnesota Court of Appeals decisions, however, suggest that the analysis under PELRA would likely track that under the NLRA.

In *Marshall County Educ. Ass'n v. I.S.D. No. 441*, for example, the court recognized that employees have an affirmative right under the Expression of Views provision of the PELRA to communicate a "grievance" without being subject to discipline.[22] Citing *Ekstedt v. Village of New Hope*, 193 N.W.2d 821, 826-27 (Minn. 1972), the court reasoned that the term "grievance" must be liberally construed.[23] The employee in that case had previously filed a grievance related to negotiation of her contract that the employer subsequently did not renew.[24] The employer decided not to renew the employee's contract when the employee stated that she would accept certain contract terms but would not discuss anything further without her representative present.[25]

The court in *Marshall County* held that the employee's negotiations for which the employer terminated the employee "arose out of" her previously withdrawn grievance and, consequently, her termination violated the Expression of Views provision.[26] Such analysis offers a solid foundation for extending PELRA protections to employee advocacy using social media and other electronic communications, especially if those communications address management or relate to a grievance filed against an employer.

Conclusion

The legal landscape governing employee expression is evolving rapidly, but the core principle enshrined in the Constitution continues to undergird the analysis. In short, speech is essential to democracy, as much in the workplace as in the political arena. Consequently, employee expression finds potential protection under an array of statutes, particularly in the ever expanding social media environment.