

## **IPMA-HR CONNECTICUT CHAPTER**

# **SOCIAL NETWORKING AND PROGRESSIVE DISCIPLINE FOR MISUSE IN AND OUT OF THE WORKPLACE**

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### **I. Background**

- A. “Social Networking” and Who is Participating
1. Millions of people all over the world, in all age groups and all walks of life, are using social networks for personal and business activities.
  2. More workplaces, including those in the public sector, are using social networking for business purposes such as:
    - a. Maintaining contact with residents, customers, clients.
    - b. Making services or products known.
    - c. Recruitment and screening of prospective employees.
    - d. Communicating with employees who are off site, conducting focus groups, sharing ideas.
  3. Some public entities are wary of social networking. The City of Redondo Beach, California has abandoned its Facebook page based on legal concerns raised by the city attorney, including:
    - a. Inability to remove vulgar posts and misinformation due to First Amendment concerns;

- b. Questions arising under the state open meetings and public records law (similar to Connecticut's FOIA);
    - c. Potential liability for comments deemed offensive in the workplace.
  - 4. Examples of Connecticut state agencies with social networking sites:
    - a. Governor's Office, DMV and Secretary of State: Facebook, Twitter and YouTube
    - b. Attorney General, Economic and Community Development, DCF, Emergency Management and Homeland Security, State Library, Public Health, Office of Healthcare Advocate: Facebook and Twitter
    - c. Comptroller: Facebook
    - d. UConn: Facebook, Twitter, YouTube, Flickr; additionally many departments and individual professors have blogs
  - 5. The focus of employers now is regulating whether, when and how social networking is used in the workplace.
  - 6. Consider social networking in much the same way you do e-mail and internet use in the workplace - many common issues and concerns.
- B. Positive and Negative Aspects of Social Networking for the Workplace
  - 1. Potential pluses:
    - a. Access to information and awareness of services
    - b. Strengthening and expanding professional relationships and contacts
    - c. Facilitating communication and sharing of ideas
    - d. Providing information to law enforcement authorities
  - 2. Examples of potential downsides:
    - a. Impact on productivity

- b. Disclosure of confidential or sensitive information
  - c. Danger of “casualness” of communication (as with e-mail)
  - d. Inappropriate or offensive posts as a source of employee claims of harassment or hostile work environment
3. Areas with pros and cons
- a. Information: sometimes helpful, sometimes overload or issues of reliability
  - b. Litigation or criminal prosecutions: access to disreputable or potentially embarrassing facts about you, as well as your opponent; police use of social media to collective evidence of criminal activity
  - c. Recruitment and screening of potential employees:
    - i. finding candidates and assessing skills, maturity, or problems in candidates’ backgrounds; but posts may disclose an applicant’s protected status/characteristics (*e.g.*, family matters, pregnancy, disability, age, marital status, religious affiliation, political affiliation, union activity, genetic information)
    - ii. reliability: information may not have been authored by the applicant; may need to give applicant an opportunity to contest authorship and authenticity)
    - iii. potential claims of discrimination if the employer is not consistent in its searches, or of invasion of privacy if information is obtained by going around privacy protections on a candidate’s site
  - d. Use in settings involving minors: opening lines of communication or creating an inappropriate relationship between adult and minor?

## II. Precursors to Discipline of Employees for Social Networking Activity

### A. Policies

1. As with all discipline, the employer must have a rule or policy governing the conduct at issue and must be able to prove that the employee violated the rule or policy.
2. Most State and municipal policies on e-mail, internet and acceptable use are broad enough to cover employee social networking in the workplace, but these policies should be reviewed periodically to keep up with changing technology.
3. Some employers have now adopted separate social media policies, including the State Department of Information Technology.
4. Other employer policies or laws also implicitly govern social networking, *e.g.*, non-discrimination, harassment, bullying, confidentiality of information.
5. Connecticut law requires that employees be notified of electronic monitoring in the workplace. Conn. Gen. Stat. § 31-48. Be sure that the policy notifies employees that workplace internet use, e-mail and use of social networking sites is subject to monitoring.
6. Consider adopting a policy on social networking in and out of the workplace if your existing policies do not cover all of the anticipated issues or concerns. (*See discussion below, however, regarding off-duty conduct and other limitations on discipline.*)

### B. Collective Bargaining Issues Regarding Policies

1. State of Connecticut, SBLR Dec. 4440 (2010): State's implementation of policy on Acceptable Use of State Systems (e-mail and internet) did not represent an unlawful unilateral change in working conditions since the new terms were reasonable measures to enforce already existing rules; nor did the State's policy discriminate against or interfere with the union since union communications were treated no differently than communications with outside professional groups.
2. Board of Trustees for the Connecticut University System, SBLR Dec. No. 3859 (2002): what rights and restrictions employees have regarding use of the use of the university's e-mail system are negotiable issues; union's proposal that university provide "access to private and secure electronic mail except as otherwise provided by

statute, regulation or a court of competent jurisdiction” is a mandatory subject of bargaining.

3. Claims of unilateral change in working conditions:

- a. Town of Wallingford, SBLR Dec. No. 3902 (2003): Town did not commit a prohibited practice when it banned on-duty use of personal cell phones by police officers; *but note* that the Board found that the management rights clause of the contract and the existing General Order gave the employer the right to determine what equipment would be used.
- b. In City of Groton, SBLR Dec. No. 4354 (2008), the Board found that the City made an unlawful unilateral change in working conditions when it banned use of personal computers by firefighters while on duty, but during “down time.”

C. Obtaining Evidence of Violations of Policies

1. Use in the workplace or on employer equipment:

- a. City of Ontario v. Quon. In Quon, the U.S. Supreme Court ruled that an employer may review electronic messages if and when that review is motivated by a work-related purpose and carried out in a reasonable way. To do otherwise would infringe on an employee’s privacy rights, which are protected under federal and state constitutions and laws. In its decision, the Supreme Court emphasized that the reasonableness of searches and seizures turns on the specific facts of each case. For example, the court noted that the plaintiff police officers could have anticipated that their messages would be monitored for investigatory purposes.
- b. If an employee is not informed that his/her electronic communications and postings may be monitored, the employee may develop an expectation of privacy.
- c. “Use it or lose it.” Effective enforcement of acceptable use policies for workplace computers, cell phones and social networking sites may require that you actually monitor use and enforce the policy uniformly. (Note that monitoring may also be required in certain situations to avoid a finding of negligent supervision.)

- d. Even if the employer has a clear policy concerning access to an employee's electronic communications or postings, there may be a question as to an employer's access to privileged communications such as those between an employee and his/her attorney.
2. Use outside of the workplace:
- a. Improper monitoring of an employee's *password protected* e-mail or networking sites may constitute a violation of the Electronic Communications Privacy Act, or the federal Stored Communications Act, which prohibit intentional access to certain stored electronic communications without authorization.
  - b. There is no legal prohibition on review of an employee's social networking posts which are not private. However, monitoring of all employees' off-duty use of these sites is impracticable. Generally, an employer will do such monitoring only in response to a complaint or other information indicating impropriety by the employee.

### **III. What Discipline is Appropriate**

#### **A. Just Cause and Progressive Discipline for Violation of Employer Policy**

- 1. The general requirements for meeting the "just cause" standard will apply, including:
  - a. Proof that the employee committed the offense or engaged in the misconduct charged
  - b. Employee's knowledge of the employer rule(s) or policy(ies) governing the matter, or that the employee should have known the conduct violated standard workplace expectations
  - c. A fair and objective investigation, including giving the employee the chance to respond to the allegations against him/her prior to imposition of discipline
  - d. Appropriate degree of discipline, taking into consideration:
    - i. seriousness of the offense

- ii. mitigating or aggravating factors
  - iii. employee's work record and seniority
  - iv. progressive discipline, if appropriate
  - v. evenhanded, non-discriminatory discipline relative to comparable situations
2. Examples of factors that influence whether progressive discipline is required:
- a. Nature of the offense: How egregious was it? Did it infringe on the rights of the employer, co-workers, clients or customers? Was it unlawful? Did it create liability or potential liability for the employer? Is it the type of offense that is amenable to corrective action?
  - b. The employee's position or status; *e.g.*, a supervisor, a "public trust employee" such as a prosecutor, a member of a paramilitary organization such as a police or fire department,
  - c. Whether the employee's misconduct may affect his ability to effectively perform the work of his position or to work with others
  - d. Impact of the employee's misconduct on the employer's business, the workplace, other employees, the agency's standing in the community
  - e. The employee's attitude: Did the employee accept responsibility? Did the employee express remorse?
3. Cases where the arbitrators felt the penalty of discharge was too harsh:
- a. City of New London -and- Police Union Local 724, Council 15 AFSCME, SBMA Case 2010-A-0190 (2010). The City fired a police officer for violation of rules on divulging information and conduct unbecoming a police officer. At a crime scene, the grievant photographed the dead body with his cell phone and sent the photos and a text message to several people. The arbitrators reinstated the grievant without back pay, concluding that lesser discipline was appropriate because, while the offense was very serious, and grievant showed "remarkable lack of common sense," it was really bad judgment and not

intentionally cruel or callous behavior. Note that the City's Computer, E-mail and Internet use policy did not expressly cover taking photos and transmitting them.

4. Cases where progressive discipline was not required:
  - a. It is well-established that “the theory of progressive discipline is [not] . . . a fixed and immutable rule to be followed without question. Instead . . . some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” In re Carter, 191 N.J. 474, 484 (2007); see Rawlings v. Police Dept. of Jersey City, 133 N.J. 182, 197-98 (1993). See also New Haven Parking Authority and Local 760, SEIU, SMBA Case No. 2005-A-0331 (2005) (observing that “[e]xtremely serious offenses constitute sufficient grounds for the immediate termination of an employee. This predicate applies even when the offending conduct involves a single event.” Case involved termination of cashier who lost a bag of cash.)
  - b. Examples:
    - i. In A.E. Staley Manufacturing Co., 119 LA 1371 (Nathan 2004), the arbitrator upheld the discharge of an employee who misused the employer's computer systems by downloading and distributing pornography from his work computer. The Arbitrator characterized the grievant's conduct as an “ongoing diversion” that was damaging in the following respects: “(a) [The Grievant] misused Company equipment, (b) wasted time for which he was being paid, (c) disrupted the efficiency of other employees, [and] (d) exposed the company to risks of liability and disruption of its overall system.” In denying the grievance, the arbitrator rejected the union's argument that the conduct was relatively benign in nature and that the penalty was too severe for a first offense.
    - ii. In an older case, Eastern Air Lines, 90 LA 272 (Jedel 1987), an arbitrator upheld the termination of the grievant for sending 14 unauthorized, unsigned messages through an in-house computerized communication system that employees used to communicate with personnel in other locations. The messages were disparaging of company management,

discredited the employer, and could have been deemed objectionable by reasonable people. Query: What if the employee posted similar comments on Facebook, not on work time or on the employer's computer? What if the employee brought a complaint to the NLRB that this was protected concerted activity? *See discussion of "protected concerted activity" below.*

3. Disparate treatment

- a. Town of Greenwich and Greenwich Municipal Employees Association and Town of Greenwich, SBMA Case 2010-A-0092 (2010). The Town fired an accounting clerk in the Fire Department for extensive violations of the Town's e-mail and acceptable use policies, including sending of thousands of personal e-mails and text messages, many of which contained inappropriate content, on work time and using the Town's computer systems. Some of the messages indicated that she had listened to private conversations, some disclosed confidential information about an employee's injuries to a person outside the department and others disclosed confidential information to a Fire Marshal who was suspended pending termination. Her communications disparaged her co-workers and used demeaning nicknames, such as "Snake" for the Chief, whom she said she wished would be involved in a traffic accident. The Union's defense claimed she was unaware of the policy, that the Town should have applied progressive discipline to a 32-year employee, and that there was disparate treatment. Despite the number and egregious nature of the violations, and despite finding that the grievant's claim to lack of knowledge of the policy was not credible, the arbitration panel reinstated the grievant without back pay. The primary rationale given was that the Town had failed to discharge the Fire Marshal, with whom she had exchanged most of the messages, and to whom she had provided information and documents for his own case. The Town has moved to vacate the arbitration award on a number of grounds.

## B. Off-Duty Conduct

1. There are limits on taking action against an employee based on off-duty activity, such as the nature of the employee's position, whether there is a nexus between the off-duty misconduct and the workplace and the impact of the misconduct.
2. In limited situations, an employee's posts on a social networking site, even if done outside the workplace, may be cause for discipline.
  - a. Example: In Stengle v. Office of Dispute Resolution, 2009 U.S. Dist. LEXIS 35612 (M.D. Pa. 2009) (termination was appropriate where hearing officer discussed work-related issues in her personal blog because the comments created concerns regarding the officer's impartiality).
  - b. Example: In Marshall v. Mayor and Aldermen of Savannah, 11<sup>th</sup> Cir., No. 09-13444 (unpublished opinion 2/17/10), the court found that the employer did not discriminate against a probationary firefighter who was fired after she posted photographs of herself on MySpace (in which "it is difficult to tell what clothing, if any, she is wearing") accompanied by photographs of other firefighters. The employee made matters worse by being "combative," "aggressive," "argumentative" and "insubordinate" during a meeting with fire chiefs regarding her conduct.
  - c. In February of this year, an Indiana deputy attorney general lost his job after tweeting that riot police should "use live ammunition" to handle the pro-labor protestors in Wisconsin. He also called the protestors "political enemies" and "thugs."

## C. Legal Limitations on Discipline

1. Free Speech rights
  - a. When a public employee's statements touch upon a matter of public concern, such statements may not be the basis for termination unless the statements contain knowing or reckless falsehoods, or cause a substantial interference with the employee's ability to perform his or her job.
  - b. Conn. Gen. Stat. § 31-51q prohibits employers from disciplining or discharging any employee on account of exercising rights guaranteed by the First Amendment or the

Connecticut Constitution, provided such activity does not “substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer.”

- c. Speech expressed as part of one’s job duties is not protected by the First Amendment, even if it relates to matters of public concern. Garcetti v. Ceballos, 547 U.S. 410 (2006).
- d. Courts have identified the following factors that must be considered in determining whether speech by a public employee is protected:
  - the need for harmony in the public work place;
  - whether there is a need for a close working relationship between the speaker and the persons who could be affected by the speech;
  - the time, manner, and place of the speech;
  - the context in which the dispute to which the speech is directed arose;
  - the degree of public interest in the speech; and
  - whether the speech impeded the ability of the other employees to perform their duties.

## 2. Discrimination or Retaliation

- a. Under State and Federal law, employers are prohibited from making employment decisions based on an employee’s protected characteristics, and also prohibited from retaliating against an employee who reports discrimination, files a complaint, supports another’s discrimination claim or participates in an investigation.
- b. Numerous other statutes protect employees from discrimination or retaliation for a variety of actions, such as filing a worker’s compensation or unemployment compensation claim, making a claim for unpaid wages or overtime.
- c. Employees who engage in “whistleblowing” are protected by State statutes and common law prohibition on discharge in violation of public policy.
- d. As a result, employers must be careful that employment actions are not based on protected characteristics or actions revealed in employees’ personal blogs or social networking sites.

3. Protected concerted activity

- a. In the private sector, restrictions on “protected concerted activity” are prohibited by Section 7 of the National Labor Relations Act. For public employees in Connecticut, SERA, TNA and MERA provide comparable protection. For example, Section 5-271, part (a) of the Connecticut General Statutes provides, in relevant part, that:

Employees shall have, and shall be protected in the exercise of, the right of self-organization, to form, join or assist any employee organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment and . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from actual interference, restraint or coercion.

- b. Note that all covered employees, whether unionized or not, are entitled to engage in “protected concerted activity.”
- c. NLRB v. American Medical Response. The NLRB issued a complaint against AMR for violation of an employee’s rights in two respects - interference with her right to engage in protected concerted activity and then failure to allow her to have union representation at a disciplinary meeting about her conduct. AMR terminated the employee after she allegedly posted negative comments about her supervisor on Facebook, in violation of the employer’s social media policy. The NLRB’s position was that the employee had a right to complain about her working conditions and to get the support of other employees for her complaints through the use of electronic communications such as Facebook. The NLRB also found the employer’s social media policy to be overly broad. The case was settled before it was heard by an administrative law judge.

*Note: The information provided in this material is not a substitute for legal advice on a specific problem. If you have a question about an actual case, please be sure to provide the actual facts to and seek counsel from your own human resources department or lawyer. Also, the views expressed in this material are those of the author and do not necessarily represent the views of the Connecticut Chapter of IPMA-HR.*