

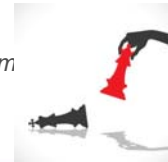
Don't Underestimate the Need for Social Media Policies

Rendi L. Mann-Stadt

Ward and Smith, P.A.
82 Patton Avenue, Suite 300 (28801)
Post Office Box 2020
Asheville, NC 28802-2020
P: 828.348.6016
F: 828.348.6077
E: rms@wardandsmith.com

Hayley R. Wells

Ward and Smith, P.A.
82 Patton Avenue, Suite 300 (28801)
Post Office Box 2020
Asheville, NC 28802-2020
P: 828.348.6018
F: 828.348.6077
E: hrw@wardandsmith.com



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Rendi L. Mann-Stadt



- Practice experience encompasses various aspects of labor and employment law and general litigation matters
- Assists private and public clients with employment agreements, employee benefits, harassment, employment discrimination, and labor relations issues
- Has represented clients before professional boards, administrative agencies, and in state and federal courts in a wide variety of employment matters, including FLSA, FMLA, USERRA, and wrongful discharge

Hayley R. Wells

- Practice primarily focuses on labor and employment law and general business litigation
- Regularly advises individual and corporate clients in matters of covenants not to compete, employment discrimination, discipline and termination, harassment, wrongful discharge, wage and hour matters, and personnel policies and procedures
- Appears regularly in state and federal courts, as well as before state and federal administrative agencies



Social Media in the Workplace



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Ubiquity of Social Media

- **98%** of 18-24 year olds use Social Media
 - Source: Statistics Brain (<http://www.statisticbrain.com/social-networking-statistics/>)
 - Facebook \approx 1.23 Billion Active Users
 - LinkedIn \approx 277 Million Users
 - Twitter \approx 243 Million Active Users
 - Instagram \approx 150 Million Users
 - Pinterest \approx 70 Million Users
 - Source: Digital Marketing Ramblings (<http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/4/>)

The New Reality: Fun Facts

- 40% of people socialize more online than face-to-face.
- There are more devices connected to the Internet than there are people on Earth.
- Of the 6 billion people on Earth, 4.8 billion have a mobile device. 4.2 billion own a toothbrush.
 - Source: Creativo (<http://www.creativo.com/blog/infographic-100-social-networking-statistics-facts-for-2012/>)

The New Reality: Not As Fun

- How Does Social Media Affect Employers?
 - Glassdoor: Reviews by current and former employees
 - Facebook/Twitter: "Posting"/"Tweeting"
 - Disgruntled employees and their complaints
 - Inappropriate behavior between co-workers or supervisors and subordinates
 - Privacy concerns
- Social Media and the problems that stem from its use are prevalent in employment.

The Impact of Social Media

- Unlike the proverbial water cooler, employees' use of Social Media to discuss work issues can easily and quickly reach thousands, even millions, of people.
- The potential audience includes co-workers, but also customers, patients, vendors, government agencies, and others.
- Take for example the following Glassdoor postings:

Dec 19, 2013

★☆☆☆☆

Culture & Values

Work/Life Balance


Senior Management

Comp & Benefits

Career Opportunities

No Opinion of CEO

“Stay Away”


Anonymous Employee (Former Employee)

I worked at [REDACTED] full-time

Pros – Good training, experience, resume value, decent benefits, but you pay a heavy price.

Cons – Very petty, cut throat, drama filled environment. Some horrible managers that will hold you back and have no mentoring experience at all. It was not uncommon for me to be yelled at in front of others simply to “set an example” for new team members and was told “I didn’t think you were anything special....” by the VP of my department. I was always sent on personal errands to fax her court custody papers, etc.

This is just the beginning. You are pressured to not take time off. When I was hourly - I was pressured to WORK OFF THE CLOCK or “fake” your lunch break.


Management plays favorites, if you are not one of them they will NEVER promote you. You have to GULP the kool-aid. If for whatever petty reason they decide they don’t like you - you are belittled and picked on for every and any reason.

I finally quit gave my 2 weeks noticed and they FIRED me. Seriously that is how it goes there - - they will always make sure they have the last word.

I cannot urge you more to stay away from this place - I am still working on gaining my confidence back and adjusting to normal environments where I don’t have to walk on egg shells.

Was this review helpful? [Yes](#) | [No](#)

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9

Dec 24, 2013

★☆☆☆☆

Culture & Values

Work/Life Balance


Senior Management


Comp & Benefits

Career Opportunities

No Opinion of CEO

“Worst Company to Work For...Ever....Period”


Sales Associate (Current Employee)


 Bolingbrook, IL

I have been working at [REDACTED] full-time for more than 5 years


Pros – None really. Even the discount was insignificant. The people I met were great but corporate had nothing to do with that.

Cons – Everything! Compensation, Poorly Educated Management, Lack of Advancement, Work/Life Balance, Hours, Inflexibility, Weekend Hours, Culture, Poor Employee Discount and anything else you can imagine.

No, I would not recommend this company to a friend – I’m not optimistic about the outlook for this company

Was this review helpful? [Yes](#) | [No](#)

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10

Reaction?

- Some employers tend to react immediately, and possibly unlawfully, to employees' offensive use of Social Media.
- Social Media 101 – Lesson One:
 - Avoid knee-jerk reactions.
 - Educate supervisors, early and periodically, about appropriate responses to posts on Social Media websites.

Limits on Employers

- Why in the world do employers have to tolerate employees' disparaging remarks on Facebook, Twitter, Glassdoor, or other online media?
 - Federal Law – The National Labor Relations Act ("NLRA") prohibits most employers from retaliating against employees because they engaged in "protected concerted activity."

Does the NLRA Concern You?

- YES, Probably . . .
 - NLRA applies to employers engaged in interstate commerce:
 - Health care facilities and medical offices are subject to NLRA if gross annual volume is at least \$250,000.
- But we're not unionized!
 - Even with non-unionized workforces, NLRA still governs and provides protection.

Basic NLRA Rights: Section 7

- "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage **in other concerted activities** for the purpose of collective bargaining **or other mutual aid or protection.**"
- ***Employees in non-unionized workforces can engage in concerted activity for mutual aid and protection.*

Definition of "Concerted Activity"

- Acting "with or on the authority of other employees, and not solely by and on behalf of the employee himself."
 - Not all concerted activity is protected. Employees can lose protection of Section 7 if their language is ***sufficiently abusive, vulgar, offensive, scurrilous, or insubordinate.***
- Concerted activity is protected if its purpose pertains to terms and conditions of employment.
- But individual gripes or complaints Do Not constitute concerted activity.

NLRA Section 8(a)(1)

- Makes it an "unfair labor practice" for any covered employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7 of NLRA.
- Implication: Be careful when disciplining and/or terminating employees based on Social Media activity.

Real Case Example

- Customer complaint made against Employee.
- Supervisor disciplined Employee regarding customer's complaint.
- Employee posted a negative comment about Supervisor on Facebook from her home computer. Employee's co-workers chimed in with support.
- In one post, Employee described Supervisor as a "**scumbag**."

"My Supervisor Is a Scumbag"

- Employer fired employee.
- NLRB determined that Employee had engaged in protected concerted activity because she and her coworkers were discussing supervisory action.
- Furthermore, NLRB determined that employee's name-calling did not disqualify her from protection of Section 7.

Tips for Employers

- Social Media: A new platform on which employees may engage in protected concerted activity.
- Lesson to Employers:
 - Discipline or separation from employment based on employee's use of Social Media may result in unfair labor charge with NLRB.
 - Potential Liability:
 - Reinstatement + Back-pay + Interest = \$\$\$
 - Note: Potential notoriety if NLRB issues written opinion.

Tips for Addressing Social Media Discipline Issues

- Implement a compliant Social Media policy.
- Familiarize supervisors with company's obligations under NLRA.
- Require supervisors to consult with senior HR employees before taking action.
- When disciplining employees for Social Media posts, determine whether post represents individual gripe (not concerted activity) or complaint on behalf of herself and other employees (concerted activity).

Tips for Addressing Social Media Discipline Issues (cont.)

- Do not assume that employee's use of profanity or other vulgar terms disqualifies her from protection under Section 7 of NLRA.
 - Focus first on whether concerted activity is present.
- Have legal counsel review policies and practices for Section 7 compliance.
- Consult legal counsel before terminating any employee related to Social Media postings.
 - Why: NLRB's guidance on this issue has been in flux over the last few years.

Confidentiality Issues

- Social Media also raises privacy and confidentiality concerns.
- Employees have an obligation of confidentiality:
 - Federal Laws
 - State Laws
 - Contracts
 - Personnel Policies

Sources of Confidentiality

- Federal Law:
 - HIPAA Privacy Rule: Protects privacy of individual identifiable health information
 - HIPAA Security Rule: Sets national standards for the security of electronic protected health information
 - Useful Resource: <http://www.hhs.gov/ocr/privacy/>
- State Law:
 - Trade Secrets Protection Act: Gives employers a private action against employees for misappropriation of trade secrets. N.C. Gen. Stat. § 66-152 et seq.

Sources of Confidentiality (cont.)

- Most common sources for employees' duty of confidentiality are:
 - (1) Confidentiality Agreements
 - (2) Employee Personnel Policies
- Apart from federal and state law, employers are free to require employees to sign confidentiality agreements as a condition of employment.
 - Also: Confidentiality provisions in employee handbooks and personnel policies.

Personnel Policies

- Employers should have a written policy addressing:
 - General Confidentiality Obligation
 - Social Media Use
 - Electronic and Other Communications
 - Internet / Information Systems
- These policies should include a disclaimer informing employees that they have ***no expectation of privacy*** with respect to use of company information systems.

Designing Social Media Policies

- Avoid over-breadth in policy prohibitions
 - i.e., Policy cannot include general prohibition against disparaging remarks or broad prohibition on use of Company's name, service marks, etc.
 - Policy cannot lawfully ban online statements that employer is "not treating employees fairly or paying them sufficiently."
 - Policy cannot require that employee seek employer approval before posting.
- Policy may include anti-harassment or bullying provision.
- Appropriate to advise employees that Social Media content is not private and may be available in litigation even if "deleted."

H.B. 846

- Job and Education Privacy Act
 - Has passed in the House; assigned to Senate Committee on Rules and Operations
- Would prohibit employers and educators from requiring that employees, students or applicants provide a username or password to an electronic account and prohibit monitoring of such accounts on devices owned by the employee/student/applicant.

Ward and Smith, P.A.
www.wardandsmith.com
800.998.1102

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