She Said WHAT About Me?

Insights
8.01.11

(Dealership Update, No. 3, August 2011)

One of your sales managers steps into your office and closes the door. "Boss, you're not going to believe what Mary, that new sales person, has said about you on her Facebook page." She posted:

"Can you believe the GM expects us to work 55 hours a week and only pays us minimum wage????? Who does he think he is? An overseer on a plantation???? One of us needs to tell that scumbag that the days of slavery are OVER!"

Your first reaction is that she needs to go and she needs to go today. After all, you are in an "employment-at-will" state, so you can terminate an employee for "good reason, bad reason or no reason at all." Insulting your boss in front of the world is certainly a good reason. Besides you have read or heard lots of stories about employees being fired for dumb things they have said on Facebook.

But hold on. There are a couple of reasons why terminating her under these circumstances could be against the law and could cost you dearly. Here's why:

Protecting Hateful Speech

First, the National Labor Relations Act (NLRA) makes it unlawful for an employer to take disciplinary action against an employee for engaging in "protected, concerted activity." The NLRA applies to *all* employers and employees, whether you have a union or not. According to the National Labor Relations Board, which enforces the Act, "concerted activity" includes gripes, complaints and protests concerning wages, hours and working conditions between and among employees. Such activity is generally "protected" so long as it is done in a reasonable manner, that is, in a non-threatening, non-malicious, non-disruptive way.

Cases involving protected, concerted activity have up until now involved oral or written comments made to coworkers and supervisors. But in 2010, the NLRB under the Obama Administration made the leap into cyberspace by issuing a complaint against an employer who fired an employee for calling her manager a "scumbag" and a "psycho" on her Facebook page. *AMR of Connecticut.* The case was discussed in a prior edition of our newsletter. *(See "NLRB Poised To Rule On Facebook Case,"* by John Polson, Labor Letter, Feb. 2011).

The NLRB took the position that the comments were concerted activity because they involved a matter of interest to more than one employee and it pointed to the fact that other employees had responded to her initial Facebook posting with their own comments. The Board also contended that the posting was protected because it was not extreme or outrageous. Finally, the Board contended that the company had maintained an unlawful policy prohibiting employees from using the internet to make "disparaging" or discriminatory" comments.

The case was settled on the eve of trial so we will never know if the judge would have agreed with the General Counsel or concluded that the comments crossed the line and became "unprotected." It's clear, however, that the NLRB under the Obama Administration intends to interpret "protected, concerted activity" in a far more "pro-employee" way than any previous Administration has.

But we also know that even in the NLRB's eyes, not every electronic comment will be considered "protected." For example, the NLRB refused to issue a complaint where a newspaper reporter was fired over Twitter comments that he had made. In that case, the reporter had posted unflattering comments about the city's homicide rate and about a competing TV station network. The Board decided that the comments had nothing to do with the reporter's own employment issues. While this case shows that the NLRB does not consider *every* posting to be "protected," it will definitely take aggressive action if there is any indication that it is.

Second, the NLRA is not an employer's only concern. If an employee posts comments on his or her Facebook page complaining about wages, discriminatory treatment, harassment or unethical or unlawful conduct – and is later fired – you have opened the door to a retaliation claim. Retaliation claims are the fastest growing kind of discrimination claims, up 63% in the last five years.

Retaliation occurs if employees can show that they engaged in some form of protected conduct – as simple as an oral or electronic complaint – and something bad then happened to them. They do not have to prove that the complaint was valid or that the employer actually did something discriminatory or unlawful. Employees need only show a connection between the complaint and the adverse employment action. Therefore, you need to recognize that once an employee makes a complaint concerning harassment, discrimination, wages, illegal conduct, etc., the employee should not be terminated or disciplined unless you have solid evidence of misconduct or poor performance.

Our Advice

The law is still developing in this area and therefore it's difficult to predict where it will wind up. So it makes sense to take steps to protect your dealership when and if it does happen to you.

For now, we recommend the following:

1. If you do not already have one, adopt a comprehensive policy concerning blogging, Facebook, and social networking, explaining what conduct is permitted and what is not. Believe it or not, many employees believe that they can say whatever they want on Facebook so long as they do it on their

own computer and after work hours. Having such a policy will help educate your employees and may prevent problems for you. Your policy should:

- address the privacy rights of customers and the need to maintain strict confidentiality of all customer information;
- define confidential company information and the need to maintain strict confidentiality;
- prohibit the use of the dealership's name and logo in any personal Facebook communication;
- prohibit employees from speaking on behalf of the company; and
- avoid prohibiting employees from making comments that "disparage" or "defame" the company, as the NLRB sees these words as unlawfully limiting protected conduct.

When you become aware of an offensive Facebook or other internet posting, do not lose your temper or overreact. Remember, you are dealing with a complicated problem and you need all the facts before you take any action. Always get a printout of the offending post. Do not base any decision on someone else's paraphrasing of the comment. Besides, if you wind up terminating the employee, you will certainly want to have a copy of the offending post as your Exhibit 1.

Make sure that the post was public. Although there are not many court rulings on this point, you can run into trouble if you access a post that was intended to be shared only among a small group and has not been made generally available.

Determine if the post involves a complaint about discrimination, harassment or unfair treatment. If so, investigate the employee's complaint as you would any other employee complaint.

What is the nature of the posting? Does it involve disclosure of customer information or confidential company information? This will almost always justify termination. But if the post could be construed as complaining about "wage, hours or working conditions," including managers' actions, these kinds of complaints are the ones that are most likely to attract NLRB attention.

Next, interview the employee to determine if he or she actually made the posting and why it was posted. Finally, talk with an employment lawyer before you take any action. The law is complicated and continues to develop. Terminating an employee under the wrong set of circumstances can create more problems for your dealership than the posting ever would.

If you would like a sample "social media" policy, please contact your regular Fisher Phillips lawyer.

For more information contact the author at jdonovan@laborlawyers.com or 404-231-1400.