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Social Media Update: Employee's Termination for Offensive Twitter Did Not Violate the National Labor Relations Act

On April 21, 2011, the National Labor Relations Board, Advice Division, issued an opinion letter to the Board's Arizona regional office in Phoenix, directing the dismissal of a fired newspaper reporter's unfair labor practice complaint. The Advice Division determined that the Arizona Daily Star, the employer of the terminated reporter, did not act unlawfully because the reporter's "inappropriate and offensive Twitter postings" did not involve "protected activity."

The reporter had worked for the Daily Star in Tuscan from 1999 to 2010, when he was fired because of certain inappropriate Twitter posts. At the time of his termination, he was assigned to cover the crime and public safety beat. The Daily Star had an employment handbook, but had issued no social media policy to its employees.

In Spring 2009, the Daily Star began encouraging its reporters to open Twitter accounts for news stories from people who might not read the newspaper and to encourage readers to view the Daily Star's website. The reporter opened a Twitter account, chose his own screen name and password, and controlled the content of his tweets. He tweeted through his computer at work. The Daily Star provided his cell-phone and his home computer. He linked his Twitter account to his other social media pages such as his Facebook and MySpace pages, so that his tweets would be simultaneously posted on these media. None of his tweets, however, would be posted to the Daily Star's sites.

Sometime in late January or early February 2010, the reporter tweeted the following, "The Arizona Daily Star's copy editors are the most witty and creative people in the world. Or at least they think they are." The tweet was in response to a series of sports headlines, using plays on words, such as "Shuck and Awe," describing the University of Arizona's loss to the University of Nebraska. In response, the Daily Star's human resources director counseled him on the nature of tweeting and stated that a social media policy would soon be distributed. Shortly thereafter, the Managing Editor, the Executive Director and the City Editor met with the reporter concerning his tweeting and informed him that he was prohibited from airing his grievances or commenting on the Daily Star in any public forum.

The reporter, however, continued tweeting: between August 27 and September 19, his tweets included the following:

- August 27 - "You stay homicidal, Tucson. See Star Net for the bloody deets."
- August 30 - "What?!?!? No overnight homicide? WTF? You're slacking Tucson."
- September 10 - "Suggestion for new Tucson-area theme song: Droening [sic] pool's 'let the bodies hit the floor'."
- September 10 - "I'd root for daily death if it always happened in close proximity to Gus Balon's."

- September 10 - "Hope everyone's having a good Homicide Friday, as one Tucson police officer called it."

- September 19 - "My discovery of the Red Zone channel is like an adolescent boy's discovery of his ...let's just hope I don't end up going blind."

This reporter also ridiculed an area television news station for a misspelling. These tweets, the Advice Division concluded, are not protected concerted activity.

On September 30, 2010, the reporter was terminated for continuing to "disregard professional courtesy and conduct expectations." Thereafter, he filed a complaint with the NLRB contending that his termination was unlawful because it stifled his Section 7 NLRA rights. In recommending dismissal of his charge, the Advice Division stated that, while it has consistently held that "an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act," discipline under these circumstances is unlawful only where protected activity was involved. The Board explained that "a discharge for conduct that violates an unlawful rule is not unlawful if the employer can establish that the conduct interfered with the employee's own work or that of other employees, and that this rather than the violation of the rule was the real reason for the discharge."

In this case, the opinion letter reasoned that while the employer's directive to the reporter to refrain from airing his grievances or commenting about the employer in any public forum could be construed as an unlawful prohibition of activities protected by Section 7, they were made "solely to the Charging Party in the context of discipline, and in response to specific inappropriate conduct, and were not communicated to any other employees or proclaimed as new 'rules.' " The employer indicated that it was in the process of developing a written social media rule, but that it did not yet have one.

The Bottom Line. This opinion memorandum, as well as the other social media issues before the NLRB, shows that the Agency is quickly defining this new emerging field, setting boundaries of social media in the workplace and clarifying how they interact with workers' Section 7 rights. Employers are urged to establish and enforce social media policies. ■

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AT&T Mobility's Impact on Employment Agreements

On April 27, 2011, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 2011 U.S. LEXIS 3367 (2011), the Supreme Court held that the class action waiver in a consumer arbitration agreement was enforceable, despite state law expressly prohibiting such waivers. The plaintiffs, a California couple, had brought a class action against AT&T in federal district court in 2006, alleging that the company had committed fraud by advertising cell phone service with "free" phones, yet charging them $30 sales tax per phone. AT&T moved to compel arbitration based on the consumer arbitration agreement in the service contract which required consumers to arbitrate all disputes and expressly waive class actions.

The Concepcions opposed AT&T's motion to compel, claiming that the consumer arbitration agreement's class action waiver was unconscionable under California's *Discover Bank* rule and, therefore, unenforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

Relying on the *Discover Bank* rule, both the District Court and Ninth Circuit denied AT&T's motion to compel arbitration, finding that the class action waiver violated state law and was unenforceable under the FAA.

The United States Supreme Court granted *certiorari*, determining that "[t]he question in this case is whether § 2 [of the FAA] preempts California's [*Discover Bank]* rule classifying most collective arbitration waivers in consumer contracts as unconscionable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 2011 U.S. LEXIS 3367, at * 11 (2011). Criticizing the *Discover Bank* rule, the Supreme Court held that the California court had essentially judged class action waivers "unconscionable" because the court disfavored bilateral arbitration to address consumer disputes. Finding that the *Discover Bank* rule disfavored the FAA's goals of enforcing arbitration agreements as written, the Court concluded that the FAA preempted the *Discover Bank* rule.

The Court rejected application of the *Discover Bank* rule to the Parties' dispute because it would have required AT&T to adopt a class-wide arbitral process wholly different from that agreed to by the parties. "Arbitration is a matter of contract and the FAA requires courts to honor parties' expectations." *Id*. 2011 U.S. LEXIS 3367, at *31 (2011). Reasoning that "arbitration is poorly suited to the higher stakes of class litigation," *id*., at *29 (2011), the Court noted that the benefits of bilateral arbitration – namely, informality, efficiency and cost-effectiveness, and procedural flexibility – would be lost in a class action arbitration; *id*., at **25-30 (2011).

So What Does *AT&T Mobility* Mean for Employment Agreements?

Admittedly, *AT&T Mobility* is a consumer protection case, but it has many correlations to and implications for employment cases. *AT&T Mobility* reinforces an increasingly more favorable view of arbitration that will benefit employers seeking to resolve disputes cost-effectively and efficiently. Employers without arbitration agreements should consider them. Employers who have such agreements should likewise consider amending them to add class action waivers.

Employers should also adhere to certain guidelines on statutory rights, scope, and notice in drafting class action waivers:

Statutory Claims.

Employers must determine whether to require employees to arbitrate their statutory claims. If so, employers must ensure that the class action waiver does not effectively eliminate the employees' right to vindicate those statutory claims. *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456, 1469 (2009) ("By agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). Failure to do so can be costly to an employer. In *Sutherland v. Ernst & Young*, 2011 U.S. Dist. LEXIS 26889 (S.D.N.Y. Mar. 3, 2011), the Southern District of New York rejected the class action waiver in the

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employer's arbitration agreement and allowed the plaintiffs' overtime claims under the Fair Labor Standards Act ("FLSA") and state wage and hour laws to proceed in litigation as a class action.

Additionally, and of particular importance in collective bargaining agreements, employers must specify the statutes under which disputes are referable to arbitration and expressly waive any rights the employee may have to litigate those statutory claims in a court proceeding. *Cf. Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998) (Court denied defendant's motion to compel arbitration of an Americans with Disabilities Act ("ADA") claim where the collective bargaining agreement only called for arbitration of "all disputes" in general and, in the absence of specificity, the Court deemed the federal court system is better suited for a claim under the ADA).

Scope.

Employers should clearly specify the scope of the arbitrator's authority in the resolution of disputes. In the absence of clear direction from the agreement, courts will refer to litigation issues they determine the "contracting parties would likely have expected a court to have decide," such as whether a contract is valid or applies to the type of dispute at hand. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

Notice of Waiver.

If amending an existing arbitration agreement to include a class action waiver, the employer must provide clear and unequivocal written notice to employees. In *Skirchack v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007), the First Circuit held that an employer could not communicate the addition of a class action waiver to its employees via an email buried within a document, which neither identified itself as containing a class action waiver nor required that its employees agree to the waiver. The Court concluded that the timing, the language, and the format of the email rendered the class action waiver both procedurally and substantively unconscionable. *Skirchack v. Dynamics Research Corp.*, 508 F.3d 49, 60 (1st Cir. 2007). ■

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