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## Social media continues to befuddle employers and employees alike

By Alan C. Blanco, Esq.

*Social media brings a new dimension to the workplace. Blackberries, iPhones, 24/7 access, Facebook, YouTube; all this new technology often blurs the line between home and work. There is little case law to provide guidance on how to construct a social media policy. Employers and employees are often unsure of the boundaries between work and personal life. As more issues are addressed, Rothman Gordon will continue to monitor how the law evolves.*

In a previous issue, we discussed how some Facebook and other social media related activity may be protected under the National Labor Relations Act. The most common complaints made to the National Labor Relations Board (NLRB) allege that employers' policies are too broad and unfairly restrict employees' use of social media and/or that employees have been unlawfully discharged over the contents of their social media posts.

In August, the NLRB's Acting General Counsel released a report that analyzed 14 cases, gathered from various regional offices, which involved social media in the workplace. Four cases found employees were engaged in "protected concerted activity." Employees cannot be lawfully discharged for engaging in protected concerted activity. Five cases found that the social media activity did not constitute protected concerted activity and the firings were lawful. Additionally, five cases found that the employer had overly broad social media policies which unlawfully curtailed employees' use of social media.

To better understand protected concerted activity and overly broad social media policies, we will examine a recent case, *Karl Knauz Motors v. Robert Becker*. *Karl Knauz Motors* illustrates both protected concerted activity and also activity which was found to not constitute protected concerted activity. Finally, the *Karl Knauz Motors* case provides an example of an employer policy which was found to be overly broad.

Mr. Robert Becker was a salesman for Knauz BMW. He made posts to his Facebook page regarding a promotional event where he criticized the quality of the food served and complained that it could negatively impact his sales commissions. Mr. Becker and another employee had voiced their unhappiness with the food choices at a company meeting and it was discussed by several salespeople after the meeting. Even though only Mr. Becker posted comments on Facebook, the administrative law judge (ALJ) found that this social media dialogue was protected concerted activity. As stated in the decision:

[Concerted activity] does not require that two or more individuals act in unison to protest, or protect, their working conditions. In *Meyers II* ..., the Board stated that concerted activities included individual activity where, "individual employees seek to initiate or to induce or to prepare for group

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action, as well as individual employees bringing truly group complaints to the attention of management. ... In *NLRB v. Mike Yurosek & Son, Inc.*, ... the Court stated “The fact that there was no express discussion of a group protest or ‘common cause’ is not dispositive ... their individual actions were concerted to the extent they involved a ‘logical outgrowth’ of prior concerted activity. The lone act of a single employee is concerted if it ‘stems from’ or ‘logically grew’ out of prior concerted activity.”

The same day, Mr. Becker posted photos of a vehicular accident which occurred at an adjacent Land Rover dealership where a car was accidentally driven into a pond by a customer’s 13 year old son. The Land Rover dealership was part of the same ownership group as the BMW dealership. There was no discussion among employees about how this might negatively impact sales commissions, so the ALJ found this posting was not protected concerted activity. “It was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees’ terms and conditions of employment,” the ALJ wrote.

The ALJ credited the employer’s testimony that the decision to fire Mr. Becker was based on the second posting regarding the accident at the Land Rover dealership, rather than his complaints about the food at the sales event.

Had the employer fired Mr. Becker for the first post (his complaints about the food at the sales event), the firing would have been illegal. Had the employer fired the employee for the first and second posts combined, the relative contribution of the first and second posts to the discharge decision would have been analyzed. However, the ALJ found the employer’s testimony that the firing was due to the post regarding the auto accident only to be credible. That post was not protected and therefore, the employer was within its rights to let the employee go.

The last issue addressed in the decision was the employer’s broad policy regarding speech critical of the dealership. At issue were the following statements in the Employee Handbook: “A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers,” and “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.” Also at issue were rules prohibiting employees to take part in interviews with or answering inquiries regarding employees with nearly anyone. The appropriate inquiry was whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights<sup>1</sup>. When rules are likely to have a

<sup>1</sup> Section 7 of the Labor Management Relations Act provides; “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

chilling effect on Section 7 rights, maintaining the rules can be found to be an unfair labor practice.

The ALJ found the statement concerning having bad attitude to be allowable but the second statement prohibiting disrespectful language to be a violation of Section 8 (a)(1) of the NLRA<sup>2</sup>. Citing *University Medical Center*, 335 NLRB 1318, 1321 (2001), the administrative law judge surmised in his ruling that “[t]he Board found that this rule violated the Act as employees could reasonably believe that their protected rights were prohibited by this rule. In its finding, the Board stated that a problem with this rule was the word disrespectful: ‘Defining due respect, in the context of union activity, seems inherently subjective.’”

The administrative law judge also found that the rules prohibiting interviews was a violation of the NLRA. Even though the employer had already voluntarily rescinded the offending policies from the handbook, the administrative law judge found that the employer had violated the law in adopting the policies and that it had to post notices indicating it would not restrain or coerce employees in exercising their Section 7 rights.

If you have questions about social media, either as an employer or employee, please contact our office at (412) 338-1100 or [ACBlanco@rothmangordon.com](mailto:ACBlanco@rothmangordon.com).



*Alan Blanco’s practice is exclusively in the field of employment law, representing primarily individuals, including executives and professionals, as well as unions and closely-held businesses with regard to employment matters.*

activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment [as provided in the statute].”

<sup>2</sup> Section 8 defines employer unfair labor practices.

## In the news...

### Thirteen Rothman Gordon partners selected by peers for The Best Lawyers In America

Rothman Gordon is proud to announce that 13 partners were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2012 (Copyright 2011 by Woodward/White, Inc., of Aiken, S.C.), representing 65% of our partners. They include: Tom Solomich and Sam Douglass for Real Estate Law; Shelley Elovitz and John Zatkos for Workers’ Compensation Law; Casey Neuman, Jim Ummer and Doug DeNardo for Trusts and Estates; Frank Salpietro for Banking & Finance Law; Colleen Ramage Johnston for Litigation – Labor & Employment; and Steve Jordan, Alan Blanco, Jim Carroll and Louis Kushner for Labor & Employment Law.

Louis was also listed for Mediation and Sam was also listed for Natural Resources Law and Mining Law. Tom was named "Pittsburgh Best Lawyers Real Estate Law Lawyer of the Year" for 2012.

In addition, *U.S. News & World Report* and *Best Lawyers®* have released the 2011-2012 Best Law Firm rankings and Rothman Gordon has achieved Tier One rankings in four practice areas: Employment Law – Individuals; Natural Resources Law; Trusts & Estates Law; and Workers' Compensation Law – Claimants.

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### Rothman Gordon Chosen as one of Pittsburgh's Top Workplaces

Rothman Gordon is pleased to announce its inclusion in *The Pittsburgh Post-Gazette's* "Pittsburgh's Top Workplaces 2011" – a list of the best places to work in the Greater Pittsburgh

region. This is the first year *The Post-Gazette* has published the list, which was determined by surveying employees of companies across the Western Pennsylvania region.

## New Faces

Rothman Gordon is pleased to welcome IST, our new on-site service provider. Our new service staff includes:



**Emily Easttey** is our Site Manager. A self-diagnosed gypsy with a love for travel, Emily is originally from upstate New York and moved to Pittsburgh two years ago. She has attended six universities in three continents and hopes to make Peru her next destination. She is completing her Political Science degree at Point Park University.



**Justin Jordan** is our Service Specialist/Messenger/File Room Clerk. Justin is originally from Norfolk, Virginia and much as he likes Pittsburgh, he hopes to someday move to a warmer climate. He enjoys writing, football (playing and watching) and trying new restaurants.



**Nicole Mutschler** is our Receptionist. Nicole is a born and raised City of Pittsburgh girl. She holds an Associates Degree in Travel & Tourism and is working on her Bachelor degree in Education. She loves going to Penguins games and her favorite time of year is the fall.

## Remembering Edward F. Sobota

Rothman Gordon has been privileged to work with TSI Titanium *aka* Tech Spec, a Western Pennsylvania manufacturer that produces cutting-edge titanium products.

Edward F. Sobota lived in Western Pennsylvania all his life and our region is the better for his contributions. After graduating from Derry High School, Ed received Vanadium Alloy & Steel Company (VASCO)'s scholarship to study engineering at the University of Pittsburgh. Thus began a lifelong commitment to math and science. After graduation, Ed worked at VASCO and then returned to Pitt for his Masters in education. He taught math and chemistry at the high school level. While he was teaching, he noticed small, specialized steel mills needed metallurgist advice specifically related to titanium. He began consulting to these types of mills and eventually decided to strike out on his own. He founded TSI in 1974, and in 1977, the company moved to its current location in Derry, PA, where Ed and TSI developed a strong community bond. Titanium was and is a niche business and TSI has established itself as a leader in the industry. It maintains that leadership position through innovation, high quality products, and quick and attentive service. TSI is one of only four manufacturers in the United States specializing in rolling and finishing titanium.

Remembering the opportunity VASCO gave him, Ed wanted to give other Western Pennsylvania students similar opportunities. In 2006, Ed established the Edward F. Sobota Engineering Legacy Fund to benefit material sciences at the University of Pittsburgh's Swanson School of Engineering. His goal was to ensure that qualified, highly-skilled people will continue to be educated and employed in Western PA. He was recognized as a distinguished alumnus in 2008.

"I worked with Mr. Sobota and his family for several years," said Doug DeNardo. "From the day I met him, you could tell this was a very, very bright man with a passion for his business. More than that, however, Mr. Sobota was dedicated to his family and his community. He was so charitably inclined and did most of his philanthropic work without wanting any notoriety or publicity."

Sadly, Ed died in a flight training session in August 2010. His son, Edward A. Sobota, has assumed leadership of TSI and continues Ed's vision of high quality manufacturing, as well as his passion for education in the math and sciences, particularly engineering.

To honor Ed's legacy, the Sobota family has developed a full engineering scholarship at the Swanson School of Engineering at the University of Pittsburgh. If you are interested in making a donation, they can be sent to Tech Spec, Inc., P.O. Box 69, Y Street, Derry, PA 15627. Checks should be made out to the University of Pittsburgh with "Sobota" in the memo line.

# Seven years as sponsor of the Pittsburgh 100

The *Pittsburgh Business Times* Pittsburgh 100, which focuses on the fastest-growing companies in Pittsburgh, was announced on August 25, 2011 at an awards reception at the Duquesne Club. Despite the volatility in the overall economy, these 100 companies managed some impressive growth over the past three years. Four Rothman Gordon clients made the list this year.

MyCoupons LLC was awarded the No. 1 ranking for the Marketing/Advertising/Publishing Industry category, and overall ranking of No. 4 on the Pittsburgh 100 list of the fastest-growing private companies in the region. MyCoupons' revenue growth from 2008 to 2010 was 576%.

After accepting the achievement Jason Wolfe, Wolfe LLC and MyCoupons CEO, states, "A combination of a truly committed group of employees, a diverse portfolio of products, and a renewed interest in the coupons and savings market has helped position our company where it is today."

The Gateway Engineers, Inc. was No. 8 for the environmental/engineering/energy category.

This marks the third time in the past six years Gateway has received this honor. "Our employees and their families are truly the ones this award should be presented to. Through their focus on delivering value-added services in a responsive

manner, Gateway is sustaining phenomenal growth. While we cannot predict the future, we believe we are poised for success," said CEO Mike Zavoina.

Kenny Ross Automotive Group was No. 12 and Omni Prepaid Group was No. 4 in the retail/wholesale/distribution category.



Bill Lestitian with Dan Deiseroth, Ruthann Omer and Ryan Hayes of The Gateway Engineers and Dave Rudolph of TriState Capital Bank.

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