



Wimberly Lawson
 Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

Briefly
 October 2011 Volume 11, Issue 10

FACEBOOK ISSUES BRING LABOR BOARD INTEREST



Jeff Jones.....

"In general, to be 'protected, concerted' activity under NLRB protection, the activity must be both 'protected,' and 'concerted.'"

The use of Facebook is becoming an employment issue as well as a social media issue. Some employers are actually conducting social media background checks in evaluating candidates for employment or promotion. There have been some interesting legal developments from such reviews, particularly in light of the fact that some states have laws prohibiting reliance on non-work related issues in employment. Recently, the National Labor Relations Board has jumped into the picture.

Social Media And Protected, Concerted Activity

During July, the General Counsel of the NLRB issued certain opinions and addressed certain Facebook issues. In one case, a WalMart worker made an extremely derogatory remark, referring to a manager, on Facebook after an argument over store displays. In another case, an Illinois bartender set forth his desire on Facebook to see the "redneck" patrons on the other side of the bar "choke on glass" as they drove home. The bartender also complained about the employer's policy barring him from sharing in tips given to servers.

In both cases, the workers appealed to the Labor Board to reverse their discharge and other discipline, and in both of the cases the NLRB declined to issue complaints on the workers' behalf. However, last November the NLRB filed a complaint against ambulance service provider AMR for firing an employee who had called their supervisor a "mental patient" on her Facebook. The employee had criticized her boss by stating, "love how the company allows a 17 to become a

supervisor," with "17" being an insider's term for a psychiatric patient. Her employer, American Medical Response, had a policy that forbid employees from criticizing the company on-line, but the Labor Board issued a complaint, arguing that such a policy was too broad, and that the on-line griping amounted to "protected concerted activity," for which an employer cannot fire or discipline a worker. The NLRB basically argued that the Facebook chatter was no different from workers gathering around the water cooler to discuss working conditions.

In general, to be "protected, concerted" activity under NLRB protection, the activity must be both "protected," and "concerted." To be "concerted" the activity must in some way relate to group action, such as "acting with the authority of" co-workers, seeking to initiate, and induce or prepare for a group action, or "bringing truly group complaints to the attention of management." On the other hand, if the employees engaging in activities solely on behalf of the employee himself, or if the employee's comments are deemed "mere griping," they are not protected by the Labor Board against employer retaliation. The line gets even more difficult when the employee does something that can be argued to be "disloyal," and so outrageous to be beyond the context of being deemed "protected" activity. In another case, the NLRB General Counsel concluded that an employee did not lose the protection of the Labor Act when she used the term "scumbag" and other similarly negative terms to describe her supervisor in remarks posted on her personal Facebook page. He stated that "the Board has found more egregious name-calling protected."

Company Policies On Social Media

On other issues, the General Counsel addressed the legality of company policies aimed at conduct like blogging, social media participation, and other public communications. He cited case precedent that even if an employer rule does not

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

EMPLOYERS MUST POST NLRB NOTICE

UNDER FINAL LABOR BOARD RULE



Howard Jackson...

"The new rule applies to almost all private sector employers, regardless of whether or not their workforce is unionized or whether they are federal contractors."

Employers are already familiar with the many federal notice-posting requirements required by OSHA, the EEOC and wage-hour. Now the National Labor Relations Board (NLRB) has jumped into the picture, issuing a final rule on August 25, 2011, requiring employers subject to the Labor Act to post notices informing their employees of their rights as employees under the Labor Act. The rule is controversial not only because it is the first NLRB-mandated rule of its type, but also because of its wording and the fact that the Labor Act, in contrast to many other employment laws, does not contain an explicit provision authorizing the requirement of such a notice.

The new rule applies to almost all private sector employers, regardless of whether or not their workforce is unionized or whether they are federal contractors. The effective date is November 14, 2011. The sole Republican member of the Board dissented and expressed his opinion that a reviewing court would one day conclude that the Board lacked authority to issue such a rule requiring employers to post a notice and to penalize employers who failed to do so. In September, the U.S. Chamber of Commerce filed a lawsuit making those very arguments, as well as a claim that the required notice posting violates employers' First Amendment rights. That suit is in its early stages, and it seems unlikely that the court will rule before the effective date in November.

The required notice not only informs employees of their rights, but emphasizes things that employers cannot do, and provides employees with information for reporting violations.

The required 11x17 inch posters can be obtained from the NLRB headquarters, or any of its offices. A copy can be downloaded from the Board's website at <http://www.nlr.gov>. While employers can reproduce and use copies of the official posters, the copies must duplicate the official poster in size, content, format, size and style of typeface. If commercial services are used to provide a poster consolidating the Board's notice with other federally mandated notices, the consolidation must not alter the size, content, format, or size and style of typeface of the Board's poster. When 20% or more of an employer's on-site workforce is not proficient in English, the employer must post a notice in the language(s) the employees speak. Employers must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable. The rule requires employers to post a notice in a conspicuous place that is readily seen by employees, including all places where other notices to employees are posted. In addition to the physical posting, the rule requires employers to post the notice on the employer's internet or intranet site if the employer customarily posts notices to employees about personnel rules or policies on those sites. Either the exact copy of the Board's poster is to be displayed, or a link to the Board's website that contains the poster.

The method of enforcement concerning the posting requirement is also controversial. A failure to post the notice may be found to be an unfair labor practice, and can also be grounds for tolling (postponing) the 6-month statute of limitations for filing an unfair labor practice charge. In addition, if the employer's failure to post the notice is found to be knowing and willful, the refusal can be used as evidence of unlawful motive in an unfair labor practice case alleging other violations. The rule also mentions the Board's authority to invoke additional undefined remedies.

Wimberly Lawson's Take On This New Federal Posting Requirement

While this new federal rule is not as important as the new proposed NLRB rules on "quickie" union elections, or the proposed Labor Department rules on reporting consultant "persuader" activities, it is nevertheless an important rule with which employers must comply. Undoubtedly, employers will need to address issues of whether they should post any "side notices," or whether any training of supervisors or other steps are necessary to make sure that the new federal notice is not taken inappropriately. Options include steps all the way from doing absolutely nothing, in hopes that

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EEOC ISSUES OPINION LETTER DEALING WITH ELECTRONIC MEDICAL RECORDS



Fred Bissinger.....

"The May 31 opinion letter addresses whether accessing personal health information in the same electronic medical record as occupational health information would constitute a disability-related inquiry."

Most employers are generally familiar with the Americans with Disabilities Act (ADA) and the Genetic Information Non-Discrimination Act (GINA), but sometimes forget the ramifications of these laws with respect to electronic medical records. On May 31, 2011, the EEOC advised in an opinion letter that employers should not maintain personal health information and occupational health information in a single electronic medical record, particularly one that allows someone with access to the electronic records to view any information contained therein.

The ADA rules for some time have prohibited asking medical questions and requiring medical examinations for current employees, unless such questions and exams are job-related and consistent with business necessity. "Generally, this means that an employer may only obtain medical information where it reasonably believes that an employee will be unable to perform the job or will pose a direct threat due to a medical condition."

The May 31 opinion letter addresses whether accessing personal health information in the same electronic medical record as occupational health information would constitute a disability-related inquiry. The opinion states that, "...there seems to be no basis for distinguishing between this situation and others that the Commission clearly has said would be disability-related inquiries, such as where an employer asks the employee or an employee's doctor to provide documentation about a disability or searches through an employee's belongings for the purpose of uncovering information about a disability." Further, under GINA, "accessing an individual's medical records directly is no different from asking an individual for information about current health status, which the Commission considers a request for genetic information where it is likely to result in the acquisition of such information, particularly family medical history."

While neither the ADA nor GINA addresses encryption, password authorization, or other electronic security, the EEOC letter stressed that if medical and genetic information is maintained electronically, employers must ensure that it remains confidential and is disclosed only to the extent permitted by the two laws.

Also, while it is not directly addressed in the EEOC letter, it can reasonably be presumed from the letter that medical information obtained as a result of a workers' compensation injury should be maintained in a separate file and disclosed only in a manner consistent with the ADA and GINA.

Another interesting but unanswered question concerns documents relating to a workers' compensation claim and an employer's right to access or otherwise obtain these records and to rely on information found in the records. At least one district court in Maine has found that the termination of an employee for lying, based on a doctor's notification to the Human Resources Department that the employee lied in his post-offer/pre-employment medical questionnaire, may violate the ADA. Whether other courts will reach a similar conclusion is uncertain. In the meantime it is safest to assume that, in addition to the suggestions above, great care should be taken before using information from any document containing medical information for any purpose other than as directly allowed by the ADA or other relevant laws.

KNOW YOUR ATTORNEY

JEROME D. PINN

JEROME D. PINN is a Member of the Knoxville, Tennessee office of the firm, which he joined in 1996. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, as well



as ADA and FMLA compliance and wage and hour law compliance. He received his Bachelor of Arts degree in Government and History from Cornell University, and his law degree from the University of

Michigan. He has been admitted to practice in the United States District Courts for the Eastern, Middle and Western Districts of the State of Tennessee.

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“FACEBOOK ISSUES BRING LABOR BOARD INTEREST”

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explicitly limit labor act-protected activities, an unfair labor practice finding will be supported where “(1) employees would reasonably construe the language to prohibit Section 7 activities; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

In the case of the employee who called her supervisor names online, the General Counsel said the employer maintained a policy that prohibited employees from posting in any media pictures of themselves that depicted the company’s logo, uniforms, or vehicles. He found the policy unlawful: “We concluded that this language violated Section 8(a)(1) because it would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company’s name, or wear a t-shirt portraying the company’s logo in connection with a protest involving terms and conditions of employment.”

In another case, the memorandum discussed a hospital that issued a policy on social media, blogging, and social networking that prohibited in broad terms employee conduct that disregarded any person’s privacy or confidentiality rights. The policy also prohibited communications or postings that constituted embarrassment, harassment, or defamation of the hospital or any employees, or that might damage the reputation or goodwill of the institution, its staff, or employees. The General Counsel said the hospital applied the privacy rule to protected concerted activity and “absent any limitations on what was covered” by the rule, it “could reasonably be interpreted as prohibiting protected employee discussion of wages and other terms and conditions and was therefore overbroad.”

But in one case, the General Counsel found that a grocery store did not violate the Act by maintaining an employee handbook provision on media relations and press interviews. The handbook informed employees that the company’s public affairs office was responsible for external communications and that it was important for one spokesman to act for the company in order to deliver its message and avoid the distribution of misinformation. He concluded that “a media policy that simply seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to affect that result cannot be reasonable interpreted to restrict Section 7 communications.” Noting that the policy was explained as an effort to ensure that only one person spoke for the company, he concluded that the rule did not convey the impression that employees were barred from speaking out concerning their own employment.

Conclusion

There are difficult lines to be drawn in drafting company policies on social media and in making decisions whether disciplinary action is appropriate. If employers wish to design their policies to address these issues, legal counsel will be necessary to draft or at least review such provisions, as broad prohibitions of any criticism of the employer are likely to be held to violate the Act. Policies will have to be narrowly written so as to avoid any restriction of protected concerted activity, and possibly also contain disclaimers of any interference with protected concerted activities. The stronger the company rationale for having such policies, the more leeway the NLRB is likely to give the employer in determining the validity of the policy. Further complicating the issue is the fact that many employers assume that the Labor Board only protects “union-related” conduct, whereas the “protected, concerted” activity cases often arise in the context of a totally non-union environment.

“EMPLOYERS MUST POST NLRB NOTICE UNDER FINAL BOARD LABOR RULE”

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“burying it” with all the other federal notices will virtually assure no one will read them, to convening a meeting of employees or otherwise providing notice to employees of why the notice is being posted and restating the employer’s position on unions. Most employers will probably choose a “middle ground” of simply explaining the situation to supervisors so they can respond to questions and report any confusion, and perhaps posting a “side letter” explaining why the notice is being posted and what the employer’s position is concerning unions.



Wimberly Lawson

Attorneys & Counselors at Law

We invite you to attend our 32nd Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 3 & 4, 2011



KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"EEOC Officials Talk Directly With You"* with guest speakers Sarah L. Smith, Director, Sylvia Hall, Enforcement Supervisory Federal Investigator, and Sally Ramsey, Senior Trial Attorney, with the Nashville, Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

“ A wealth of beneficial information ”

“ Very informative, helpful and enjoyable ”

“ All pertinent areas of HR covered ”

“ Well presented, understandable, relevant ”

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The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.



Wimberly Lawson

Attorneys & Counselors at Law

TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the thirty-five or more topics are:

- Healthcare Reform Headaches for 2012
- FLSA Hot Buttons and Enhanced Federal Enforcement
- Social Media in the Workplace – Unforeseen Dangers for Employers
- Nuts and Bolts of Unemployment Claims
- Employment Contracts and Agreements – How They Can Protect Employers
- Wage and Hour Compliance Tips/Class-Action Alerts
- Employer Policies/Handbooks – For Better or Worse
- Records Retention Guidelines/Litigation Holds
- Employee Conduct and Appearance – On and Off the Job
- Workplace Crisis/Violence in the Workplace – How to Prevent and Protect
- Workers Compensation Update/Strategies – One of Your Biggest Employment Costs
- EEOC Compliance/Charge Responses – EEOC Officials Talk Directly With You
- USERRA (Uniformed Services Employment and Reemployment Rights Act)
- Labor Update/Impacts of Continuing Recession/Union Initiatives
- Employer Access to Employee Medical Information: GINA, ADA and FMLA
- Affirmative Action Requirements – Who and What

Join us in Knoxville on November 3rd and 4th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member



South Carolina
Greenville

Tennessee
Knoxville Morristown Cookeville Nashville

Georgia
Atlanta Athens

AGENDA

Thursday, November 3, 2011 (9:15 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review
Overview of Department of Labor Initiatives
Healthcare Reform Headaches
Labor Unions Impact on Upcoming Elections
Class Actions and Implications for Employers

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Social Media Implications in Employment/Labor
FLSA Hot Buttons and Enhanced Federal Enforcement
Overview of EEOC Initiatives
ADAAA - Forget What You Always Knew
Practical Strategies to Defend Workers' Compensation Claims
Handbooks and Policies - Do We Really Need All This?
Labor/NLRB Update in Depth

12:00 p.m. - 1:15 p.m. - Lunch (*As Guests of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker, Dr. Farris Jordan, *"Staying Motivated Through Comic Vision"*

2:45 p.m. - 3:45 p.m. - Breakout Sessions

EEOC Compliance - EEOC Officials Talk Directly With You
How to Avoid Class Action Litigation/Consequences
ICE Enforcement and Current Trends in I-9 Audits
Employee Contracts: Who Needs 'Em?
Affirmative Action Update
FMLA - Beyond the Basics
HR Jeopardy - Interplay Between ADA, FMLA and WC

4:00 p.m. - 5:15 p.m. - General Session

Legislative Developments in Workers' Compensation
Constitutional Impact on Employment Issues
Whistleblowing Gone Wild
Internal Investigations
Challenges for Corporate General Counsel

5:15 p.m. - 7:00 p.m. Reception (*please join us for scrumptious hors d'oeuvres*)

Friday, November 4, 2011 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session

USERRA
Independent Contractors - More Dangerous Than Ever
Sexual Harassment - Still Don't Get It!
Employment Litigation Trends

9:45 a.m. - 10:45 a.m. - Breakout Sessions

FMLA - Beyond the Basics
There's Something About "GINA"
OSHA 2011: Bigger and Meaner, and Heading Your Way
Practical Strategies to Defend Workers' Compensation Claims
EEOC Compliance - EEOC Officials Talk Directly With You
Strategies for Hiring Criteria - Using Unemployment History, Credit Checks,
Criminal Arrests, Convictions and the Like
Unemployment Claims - Tactics and Strategies

11:15 a.m. - 1:00 p.m. - General Session

Records Retention and Litigation Holds
Workers' Compensation Case Law Update
Jury Waivers/Mandatory Arbitration
Documentation Do's and Don'ts
Employment Issues That Will Affect 2012 Political Elections

1:00 p.m. Conclusion



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.50 general credit hours.

This program has been approved for 9.50 general credit hours by the National Association of Legal Assistants (NALA).



Wimberly Lawson

Attorneys & Counselors at Law

Thirty-Second Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 3-4, 2011**

COST:

- Early Bird (registration AND payment received by Sept. 30)
 - \$309 per person
 - \$299 for each additional person from same company
 - \$259 for eight or more from same company
- Registration and payment received AFTER October 15
 - \$349 per person
 - \$339 for each additional person from same company
 - \$299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 3, 2011

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 12. Cancellations made after October 25, 2011 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

HOTEL ACCOMMODATIONS Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.00/standard.

800-836-8031

RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code LAWLAWA to reserve at the conference rate)

FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com
5. Phone: 865-546-1000



KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of

"Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

Dr. Jordan's presentation will help you learn:

- what your stress-coping behavior reveals about you
- if you have a stress-prone or stress-tolerant personality
- why you experience worry and depression
- how well you are satisfying your 6 basic psychological needs
- your happiness IQ
- your social awareness score
- if you are in the right job

Name _____

Company _____ Address _____

City _____ State _____ Zip _____

Phone _____ - _____ - _____ Fax _____ - _____ - _____

Email _____

BPR and State for CLE: _____ No. Attending Reception: _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.