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PILCHAK COHEN & TICE, P.C.
THE EMPLOYERS LAWYERS

WORKPLACE CHRONICLE

Inside this issue:

NEWS FROM THE NLRB NEW POSTING REQUIREMENT TO BEGIN NOVEMBER 14, 2011 1

NLRB RELEASES GUIDANCE ON SOCIAL MEDIA POLICIES IN THE WORKPLACE 2

CHAMPION'S AIDED BY AGENCY HOLDING OVERRULED BY THE MICHIGAN SUPREME COURT 3

Recent Victories for Our Clients

PCT successfully defended an arbitration brought by the **UAW** challenging the discharge of an employee who overstayed his welcome at a customer's facility. The grieving employee had claimed that his transportation home from the customer's facility had been disrupted when his co-worker became ill and could not work. Rather than make alternate arrangements for transportation, the employee essentially moved into the customer's facility, and was discovered sleeping in a vacant office. The arbitrator found that the employee was not entitled to reinstatement or back wages, even though there was no specific work rule which prohibited employees from spending the night at the customer's facility. **PCT** argued that some rules are so obvious that they do not have to be stated in the work rules.



NEWS FROM THE NLRB: NEW POSTING REQUIREMENT TO BEGIN NOVEMBER 14, 2011

By Daniel G. Cohen

On August 25, 2011, the National Labor Relations Board ("NLRB") announced that it has finalized a rule first proposed last December that will require all employers subject to the jurisdiction of the National Labor Relations Act to display a poster that advises employees of their right to form a union and otherwise advises employees of their rights under the Act. Virtually all private sector employers will be affected by this new rule, which takes effect on November 14, 2011. The rule requires employers to post the notice in all places where notices are customarily posted in each of their facilities. Employers that post work rules electronically would have to put the union rights information on their websites as well as in posters. Failure to post the notice may be treated as an unfair labor practice under the Act. A willful failure to post the notice can be used as evidence of employer animus against unions in a subsequent NLRB proceeding.

It should come as no surprise that the poster focuses on an employee's right to organize, join and support a union, to bargain collectively, to engage in concerted action and to strike and picket while ignoring an employee's right to organize with other employees in opposition to a union, or the right to refuse to form, join, or assist a union, including the right to refuse to sign a union card, attend a union

meeting or supply a union with information concerning you, your co-worker or your job. To offset the one-sidedness of the poster, we recommend a poster that can be displayed alongside the NLRB poster that sets forth the additional rights of employees to say "no" to the union and of their right to voice their opinions about the union without fear of reprisal from union supporters.

The NLRB's new rule is the first significant rule proposed by the NLRB in years and is an aggressive and blatant attempt by the Obama Administration to help unions in whatever way it can. Most experts believe that the NLRB will next set its sights on the procedure for union elections. The current rule requires a secret ballot election within 42 days of the filing of an election petition by a union. This is plenty of

time for an employer to campaign against the union by educating its employees about the reality of being represented by a union, which is typically not explained to employees by union organizers. The Obama Board would like to significantly reduce this amount of time because it would favor unions and make it more difficult for employers to mount its union-free campaign.



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- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

NLRB RELEASES GUIDANCE ON SOCIAL MEDIA POLICIES IN THE WORKPLACE

By Daniel G. Cohen

In July, 2011, the NLRB released three Advice Memoranda which illustrate the Board's position that social media policies violate the Act only when the policies or practices specifically target employee concerted activity. Read together, these Memoranda clarify that an employee's **personal** complaints on Facebook, MySpace, Twitter, etc. about his/her employer are unprotected activity, which can lead to discipline or discharge. In each of the three matters, the NLRB Associate General Counsel found that the Charging Parties had not engaged in protected concerted activity but had engaged in what amounted to "mere griping."

In JT's Porch Saloon, a bartender posted his complaints about the employer's tipping policy on Facebook in response to an inquiry by a family member. The bartender stated he had not received a raise in five years, was doing waitress work without tips, referred to his employer's customers as "rednecks" and that he hoped the customers "choked on glass." In the Wal-Mart case, an employee criticized his manager, made vulgar comments

about him and accused Walmart of false advertising. The employee also posted a "Wuck Falmart" message. Other employees subsequently sent messages of support. Finally, in Martin House, an employee communicated with non-employees on Facebook about the employer's homeless residents and made derogatory comments about their mental conditions.

These three Advice Memoranda clearly demonstrate that an employee cannot air personal grievances or make derogatory or critical comments about his/her employer or management team through social media with impunity. While an employer may not prevent employees from using social media to act with or by the authority of other employees, bring group complaints or organize employees, employers can adopt policies which prohibit employees from using social media to disparage their company, managers, and customers and discipline employees who violate the policies.



CHAMPION'S AIDED BY AGENCY HOLDING OVERRULED BY THE MICHIGAN SUPREME COURT

BY William E. Pilchak

In July, 2011, the Michigan Supreme Court overruled its earlier decision in *Champion v. Nation Wide Security, Inc.*, 450 Mich 702 (1996), which had imposed strict liability upon employers under the Elliott Larson Civil Rights Act ("CRA") for the unforeseeable criminal acts of its supervisors. In *Champion*, an employee was raped by her supervisor after the supervisor led her to a remote area of the building, locked her in a room, and demanded sex. The *Champion* Court had relied upon an "aided by agency" theory and concluded that an employer is liable for quid pro quo sexual harassment under the CRA even for the unforeseeable criminal acts of its supervisors. Citing multiple federal cases, the *Champion* Court held that "an employer [is] strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim."

Champion stood as the only Michigan case to impose liability on an employer for the unforeseeable criminal acts of its employees, and employers were defenseless under the CRA if their supervisors committed sexual assaults upon employees. Michigan employers can breathe more easily now that *Champion* has been overruled by *Hamed v. Wayne County*, ___ Mich ___ (July 29, 2011). In *Hamed*, a jail inmate was sexually assaulted by a deputy sheriff. She sued the sheriff, Wayne County, and the Wayne County Sheriff's Department among others, alleging a claim for sexual harassment affecting public services under the CRA. *Hamed* appealed after her civil

rights claims were dismissed by the circuit court.

The Supreme Court sustained the dismissal because defendants had no actual or constructive knowledge of any prior similar criminal sexual misconduct. According to the Supreme Court, "defendants may not be held vicariously liable for quid pro quo sexual harassment based on Johnson's unforeseeable criminal act under traditional principles of respondeat superior." In doing so, the Supreme Court determined that *Champion* had been wrongly decided and opted to overrule it. The Supreme Court noted that the CRA specifically incorporated common-law agency principles in its definition of "employer" and that those common law principles did not include the aided by agency exception identified in *Champion*. The Court further rejected *Champion's* reliance on federal case law because federal civil rights statutes do not incorporate Michigan's common law agency principles like the CRA does.

Hamed restores Michigan's common law vicarious liability analysis in quid pro quo CRA cases. Michigan Employers can once again defend CRA actions on the basis that its supervisor's criminal conduct was not foreseeable. Of course, employers will continue to be liable if supervisors with episodes of prior sexual misconduct are hired and they continue that pattern in the workplace.

EEOC ORDERED TO PAY EMPLOYER \$2.6 MILLION

A federal judge in Detroit has ordered the U.S. Equal Employment Opportunity Commission to pay Cintas more than \$2.6 Million in legal fees and costs for needlessly prolonging a 11 year-old job discrimination case. U.S. District Judge Sean Cox said the EEOC "engaged in reckless sue first, ask questions later strategy" contrary

to federal law. Most legal commentators called this one of the largest fee awards ever levied against the EEOC and referred to it as a "major embarrassment." Of course, we at PCT applaud Judge Cox and hope the EEOC takes heed of this award in future cases that have no merit.



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You can find back issues of the *Workplace Chronicle* on the Web at “www.mi-worklaw.com”



OCT. 6, 2011
5 to 8 PM

Walter P. Chrysler
Museum
Chrysler Technology
Center
One Chrysler Drive
Auburn Hills, MI

FEAST YOUR EYES AND ENJOY A NIGHT AT THE (CHRYSLER) MUSEUM ON US!

Clients of PC&T are cordially invited to join our attorneys at the Taste of Auburn Hills event on Thursday, October 6, 2011, 5:00—8:00 pm, at the Walter P. Chrysler Museum on the grounds of the Chrysler Technology Center in Auburn Hills, as we support the Auburn Hills Chamber of Commerce. Enjoy the tempting fare of over 15 restaurants and more with cocktails while strolling among the fabulous automobiles and exhibits. Call Dawn or Kelly at 248.409.1900 or email us at PCT@mi-worklaw.com to arrange for two free tickets. (If you do not receive a return email confirming receipt within a day or two, email again). Additional tickets for family and friends may be purchased online at auburnhillschamber.com or by calling the Auburn Hills Chamber 248.853.7852.

Participants:

Alfocchino Restaurant	Bar Louie Tavern & Grill	bd's Mongolian Grill	Costco Wholesale
Culver's	Fieldstone Golf Course	Gordon Food Service	Hilton Suites
King's Court Castle	Lelli's	Longhorn Steakhouse	Mr. Pita
O'Malley's	Palm Place	Panera Bread	Post Bar
Sam's Club	Sante Fee	Toby Keith's I Love this Bar	

Also Fieldstone Winery & Detroit Beer Company offerings

