WILLCOX SAVAGE

EMPLOYMENT LAW OUTLOOK

COMPLAINT ALLEGES EMPLOYEE ILLEGALLY FIRED OVER FACEBOOK POSTINGS

William E. Rachels, Jr.

An NLRB regional office has issued a complaint alleging that an employer illegally terminated an employee who posted negative remarks about her supervisor on her personal Facebook page. The complaint also alleges that the employer maintained and enforced an overly broad blogging and Internet posting policy, as well as denial of union representation in a potential disciplinary situation.

When asked by her supervisor to investigate a report concerning a customer complaint about her work, the employee requested and was denied representation by her union. Later that day, from her home computer, the employee posted negative remarks about the supervisor on her personal Facebook page. Her actions drew supportive responses from her co-workers. The employee then shared negative comments about her supervisor. The employee's postings included several expletives and a reference to the supervisor being a psychiatric patient. The employee was terminated because such postings violated the company's Internet policies.

The complaint alleges that such Facebook postings constituted "protected concerted activity" and that the company's blogging and Internet-posting policy contained unlawful provisions, including one that prevented employees from making disparaging remarks when discussing the company or supervisors. Such policy provisions are alleged to constitute interference with employees in their right to engage in protected concerted activity and thereby are an unfair labor practice under the National Labor Relations Act.

It is to be noted that the right to protected concerted activity under Section 7 of the National Labor Relations Act applies to both non-union and union employment environments.

Specifically, the subject policy provided "employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."

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GINA REGULATIONS IMPOSE AFFIRMATIVE EMPLOYER DUTIES

Samuel J. Webster

The Genetic Information Non Discrimination Act (GINA), 42 U.S.C. § 2000ff *et seq.*, became law in 2008. The Act has two major components: prohibiting discrimination on the basis of genetic information in the health care benefits area (Title I), and prohibiting employment discrimination on the basis of genetic information (Title II). This article concerns the new employment discrimination regulations.

GINA's Title II generally prohibits any employment action based upon genetic information. More specifically, GINA prohibits employers from hiring, firing, or otherwise discriminating against an employee or applicant based upon genetic information, and it prohibits any sort of classifying, segregating, or limiting employees based upon genetic information. The Act prohibits employers from obtaining genetic information except in certain very limited circumstances, and it prohibits the disclosure of genetic information. Violations of Title II may result in both compensation and punitive damages, attorneys' fees, experts' fees, and injunctive relief, including reinstatement or hiring and back pay. The EEOC, charged with enforcing GINA's Title II following Title VII's employment discrimination structure, issued its final regulations on November 9, 2010.

The GINA Title II final regulations provide guidance to employers on the very limited exceptions to GINA's general prohibition from requesting, requiring, or purchasing genetic information. An employer will not be liable for acquiring genetic information via the following means:

- Inadvertently, as part of health services provided on a voluntary basis, including voluntary wellness programs;
- Regarding family medical history to comply with FMLA certification requirements, state or local leave law, or certain employer leave policies;
- Commercially or from publicly available sources (*e.g.* magazine, newspaper, television, Internet);

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WHISTLEBLOWER PROTECTION NOT A LICENSE TO ATTACK EMPLOYER

Bryan C.R. Skeen

By now, employers should be aware of the expansive (and still expanding) federal whistleblower protections available to employees who report actual or perceived violations of various federal laws. These whistleblower protections, enforced by the Occupational Safety and Health Administration (OSHA) arm of the Department of Labor, come from 20 federal statutes covering a variety of subjects, including transportation, pollution, workplace safety, and consumer safety. But, as a recent decision from the United States Court of Appeals for the Seventh Circuit illustrates, employees who report violations must do so in a reasonable and nonoffensive manner in order to benefit from these whistleblower protections.

In *Formella v. U.S. Dept. of Labor*, the Seventh Circuit upheld the termination of a truck driver who complained about the condition of his truck by finding that the manner in which the driver voiced his concerns was unreasonable.

> **The Seventh Circuit upheld the termination of a truck driver who complained about the condition of his truck by finding that *the manner* in which the driver voiced his concerns was unreasonable.**

Formella worked for Schnidt Cartage, Inc. as a truck driver who drove short routes in and around Chicago. On February 23, 2006, Formella inspected his assigned truck and discovered what he believed to be numerous safety concerns, including mismatched tread on the rear tires, high-beam headlights which did not work, and an absence of the requisite Department of Transportation permits.

After identifying these concerns, Formella went to the dispatch office and spoke with his supervisor, and the supervisor asked the head of maintenance to inspect the truck. As the discussion continued, however, Formella became "louder" and "more vehement." He yelled at his supervisor and other office employees, questioned their competence, and became more and more volatile. Formella was so loud that employees in the building's warehouse ran to the office to see if someone needed help. The supervisor testified that she felt threatened by Formella's conduct. Before the situation could escalate further, the supervisor fired Formella.

Formella filed a whistleblower complaint with OSHA under the Surface Transportation Assistance Act (STAA). The whistleblower provisions of STAA prohibit a commercial truck driver from being discharged, disciplined, or otherwise penalized for reporting safety concerns. In his complaint, Formella alleged that he was discharged for reporting what he believed to be unsafe conditions of his assigned truck. The trucking company argued that it discharged Formella for the manner in which he complained, *i.e.*, his attitude and unacceptable demeanor, not for the complaint itself.

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The NLRB's acting general counsel stated "this is a fairly straight-forward case under the National Labor Relations Act – whether it takes place on Facebook or the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that."

The general issue appears to be whether the stated policy is overly broad and thus has an illegal chilling effect on various protected concerted activity and/or direct union activity. The second issue is whether the particular activity involved is protected concerted activity. On the latter issue, in the past courts have often viewed workers' statements as disloyal and unprotected when they are defamatory and are not supported by facts.

It appears that the Obama-NLRB, which is presently 3-1 Democratic, is proceeding more aggressively on these issues than has been done in the past. In December 2009, the NLRB's Office of the General Counsel issued an Advice Memorandum finding that the policy there in question could not be reasonably viewed by the employee as prohibiting protected concerted activity. The policy prohibited "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." In that situation, there was no employee discipline involved and the issue was limited to the substance of the policy itself. However, comparison of these policies suggests that we are now in a new day with the NLRB on these issues.

The NLRA procedure states that the complaint will first be heard by an Administrative Law Judge. Such decision can be appealed to the NLRB. From the NLRB, an appeal can be taken to the U.S. Circuit Court of Appeals. So it may be two years or so before a resolution of this case is achieved in the court system.

In the interim, it will be wise for employers to review their social media policies. The lines are far from clear at this point. The conservative approach to lessen an NLRB challenge may be to state that the prohibitions do not cover reasonable complaints or statements regarding employment terms or conditions. However, such opens the door and many employers may understandably decide to maintain more strict prohibitions for the good of the order until they are challenged or the law is clarified.

The issue of what particular postings go beyond protected concerted activity will need to be analyzed on a case-by-case basis. Although NLRB decisions have allowed rather hostile comments in the pre-social media context, one would hope that there is at least room to enforce rules of decency in dialogue. Such is particularly so when consideration is given to the universe of persons beyond the water cooler who can be exposed to such postings.

While there appear to be more downsides than upsides for employers in these developments, one potential benefit from a negative employee posting is that an employer may be alerted to an underlying problem and can address it before it enlarges.■

GINA REGULATIONS IMPOSE AFFIRMATIVE EMPLOYER DUTIES

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- As part of a genetic monitoring program either required by law or offered on a voluntary basis;
- Through social media, provided the employer has permissive access.

Under all circumstances, any genetic information must be segregated from other personnel information, and the employer must establish procedures for preventing its disclosure.

Inadvertent Request for Medical Information

GINA generally prohibits an employer from requesting genetic information. The new regulations impose upon the employer the **obligation** to inform a health care provider from whom medical records are requested **not to provide genetic information**. Coupled with the general prohibition and the ensuing obligation, the regulations now provide guidance to employers in the event of "inadvertent" acquisition of genetic information.

Employers routinely and lawfully seek medical documentation for ADA reasonable accommodation analysis, FMLA leave certification, pre employment and return to work physicals, to name a few. The new GINA Title II regulations fortunately provide "safe harbor" language to provide protection to employers in the event of disclosure of genetic information by the party providing the medical records. The "safe harbor" language notifies health care providers from whom information is being requested that they should not provide any genetic information, including family medical history, in connection with any lawful request for medical records:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

29 C.F.R. § 1635.8(b)(0)(i)(B) (75 Fed. Reg. 68932 (Nov. 8, 2010)). To assure against liability for inadvertent requesting or acquiring genetic information, employers must now include this "safe harbor" language in all lawful requests for medical documentation. Moreover, in the event the employer inadvertently obtains genetic information, it must segregate the information from other personnel data, and it must protect against any further disclosure of the information.

The regulations cover other forms of inadvertent acquisition of genetic information: overhearing "water cooler talk", casual conversation, unsolicited disclosure, inadvertent disclosure in e-mail or social media (Facebook, Twitter, LinkedIn, etc.). Managers should be trained to make absolutely no follow-up inquiries following some form of casual inadvertent discovery of genetic information.

Voluntary Wellness Programs

With health care costs spiraling upward, many employers and their health insurers are instituting voluntary wellness programs, which may include incentives for participation. The wellness programs generally involve a health risk assessment. While the health risk assessment may inquire about family medical history or other genetic information, it must specifically identify which questions request that genetic information and make very clear that the questions are optional and that the program incentives are not dependent upon answering those questions. Under no circumstance may the employer make any employment-related decision based upon what it learns in the health risk assessment, and it may not condone any sort of harassment for failure to provide the requested information.

What Employers Must Do

Given GINA's novelty, the new Title II regulations (effective January 10, 2011), and the very limited exceptions to acquiring and using genetic information, we recommend that employers take immediate steps to protect themselves and comply with GINA:

I. Add genetic information as a protected class to all EEO statements in handbooks and on posters and make sure that the employer's anti-harassment policies include genetic information.

II. Immediately incorporate the regulations' "safe harbor" language to avoid liability for inadvertent or unintentional access to protected genetic information:
   - FMLA forms
   - Short and long term disability forms
   - Workers' compensation forms
   - Pre-employment and return to work medical examination forms
   - ADA medical examination or accommodation forms

III. Segregate from other personnel data as "confidential medical records" any genetic information obtained.

IV. Train managers/supervisors regarding interactions with employees and employee family members regarding medical issues without requesting genetic information.

V. Review and modify, where necessary, wellness programs for compliance with the Title II regulations.

The Willcox & Savage labor and employment team stands ready to assist with compliance with this latest wrinkle to the anti-discrimination laws.■

WHISTLEBLOWER PROTECTION NOT A LICENSE TO ATTACK EMPLOYER

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The Seventh Circuit agreed with the trucking company. As the court noted colorfully, "An employee's entitlement to submit a complaint about a vehicle's safety would not mean that the employee was similarly entitled to attach the complaint to a rock and throw it through his supervisor's window." Here, Formella's unreasonable, volatile, and antagonistic behavior crossed a line beyond the STAA's protection. Although the court did recognize that an employee who is reporting a safety concern must be granted some leeway for impulsive behavior in vigorously pursuing a complaint, that leeway does not include the right to engage in "insubordinate and disruptive behavior."

This decision affirms an employer's right to maintain order and behavior policies in the workplace by disciplining employees who engage in insubordinate or otherwise unreasonable behavior. Even though employees may have a protected right to point out safety concerns, they must do so in a way that maintains civility and respect. In any case, employers should always consult legal counsel prior to disciplining any employee who they believe has engaged in any protected whistleblowing activity.■

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