THE
NATIONAL LAW REVIEW

Regulating Employee Personal Conduct Through Employment Policies

Article By
Labor & Employment at Dinsmore
Dinsmore & Shohl LLP

- Intellectual Property
- Communications, Media & Internet
- Labor & Employment

- All Federal

Monday, March 19, 2012

Many employers seek to regulate various aspects of employees' personal conduct, such as restricting romantic relationships and **limiting what employees may say through social media--and with good reason:** Romantic relationships among employees may lead to accusations of workplace unfairness when implementing disciplinary measures or awarding privileges, or perceived favoritism regarding assignment of job responsibilities or promotion decisions; particularly when one of the involved employees supervises the other. Workplace relationships can also negatively impact employee morale, decrease productivity and, most importantly, result in sexual harassment claims. Employee conduct on social media outlets creates similar problems. Disparaging and offensive posts about fellow employees can give rise to a whole host of unwanted legal allegations, such as discrimination, harassment, and retaliation. Furthermore, supervisors who associate with their employees on social media sites may create similar perception problems, particularly where the supervisor "friends" only some of their reporting employees, but not others.

To combat these potential issues, **many employers have created non-fraternization and social media policies.** Depending on the breadth of the written policies, however, these policies may have the unintended consequence of prohibiting conduct other than romantic relationships or derogatory comments, which may cause unwanted legal ramifications for the employer under the National

Labor Relations Act (NLRA). Moreover, these types of policies are typically disfavored by employees, many of whom believe their personal relationships and off-duty conduct are private and should not be scrutinized or regulated by employers. Thus, implementation of non-fraternization policies and social media policies may result in unhappy employees, which in turn, could lead to discrimination lawsuits and claims.

To avoid such potential legal woes, employers seeking to adopt these policies must ensure their policies are: (1) carefully crafted, and (2) consistently enforced. Following these two steps will greatly reduce an employer's risk of running afoul of either the NLRA or federal discrimination statutes.

A Carefully Constructed Policy is Necessary to Avoid Violations of the NLRA

Section 7 of the NLRA gives employees the right to, among other things, engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 affords these rights to both union and non-union employees alike, and includes employee efforts to improve working conditions and terms of employment.

A work policy that may chill employees in the exercise of these rights could violate the NLRA. Even if nothing in the policy explicitly restricts Section 7 activity, it may still violate the NLRA if employees can reasonably construe the language in the policy to prohibit such activity. Additionally, these policies may be held to violate the NLRA even absent evidence of enforcement of the policy. In other words, merely having the written policy in a handbook—regardless if the employer has ever enforced it—may violate the NLRA.

It is for these reasons that having narrowly tailored non-fraternization and social media policies is a must. For instance, a policy that prohibits employees from "dating or fraternizing on or off duty," is likely broader than necessary to serve the employer's legitimate purpose of avoiding workplace relationships. Since the word "fraternize" may be understood to mean "associate," "cooperate," "join" or "unite," this overly inclusive language may lead employees to reasonably interpret the policy as prohibiting them from discussing terms and conditions of employment, which is a violation of Section 7. As explained in **Guardsmark, LLC v. NLRB**, 475 F.3d 369 (D.C. Cir. 2007), which found a similar non-fraternization policy to violate Section 7, "employees could hardly engage in protected activity without fraternizing with each other."

Likewise, the **National Labor Relations Board (NLRB)** could interpret an overly broad social media policy as restricting an employee's right to criticize terms and conditions of employment with other employees on a social media site will violate Section 7. For instance, the Office of the General Counsel for the NLRB opined that prohibited "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites" violated Section 7 because employees have the right to discuss their terms and conditions of employment with the company, despite its potentially defamatory nature.

In sum, policies that regulate an employee's personal conduct should be designed to prohibit only the conduct necessary to achieve the desired goal. If the employer seeks to prevent romantic relationships among supervisors and employees, the policy should state just that, and nothing more. If the employer wishes to prohibit employees from posting confidential information and/or or harassing or intimating comments about other employees, the policy should clearly articulate as much.

As an added safeguard, employers may want to include language to the policies explicitly excepting Section 7 protected activity from the policy. While this is not a clause that will prevent an otherwise overreaching policy from violating Section 7, it may assist in providing a reasonable interpretation demonstrating the policy does not prohibit such conduct.

Fair Implementation of the Policy is Necessary to Avoid Discrimination Liability

Even if the employer has perfectly crafted non-fraternization and social media policies, the policies may still result in liability under discrimination law if not enforced properly. Non-fraternization and social media policies are generally unpopular among affected employees, and when enforcement results in employee discipline (which may include termination) there is an increased possibility that a lawsuit will follow. Such lawsuits may allege, for instance, that the employer only enforced the policy against a certain race, gender, etc. The key to overcoming allegations of discrimination is to enforce the policy consistently; so that no employee can successfully allege they were singled out for enforcement based upon a protected status. The Sixth Circuit Court of Appeals recently demonstrated in **Ayers-Jennings v. Fred's Inc.**, No. 10-6228, 2012 Fed. Appx. 0174N (6th Cir. Feb. 13, 2012), the importance of enforcing employment policies of this nature consistently.

In Ayers, the Plaintiff, an African-American woman, was forced to resign based upon the company's non-fraternization policy because she married a supervisor within her facility. After resigning, Plaintiff brought suit under Title VII, alleging her termination was actually motivated by race discrimination.

The court upheld the grant of summary judgment for the employer because the Plaintiff could not establish a prima facie case of race discrimination. She was unable to establish that similarly situated employees outside the protected class were treated more favorably in enforcement of the non-fraternization policy. Specifically, the court found no evidence the employer had ever allowed married employee-couples, of any race, to continue employment under circumstances where one was subject to the possibility of supervision by the other.

As Ayers demonstrates, consistent enforcement of employment policies—particularly disfavored ones—is crucial for avoiding liability under federal discrimination laws.