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Best Practices
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BEST PRACTICES: LABOR RELATIONS & EMPLOYMENT LAW

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UPCOMING EVENTS

Executive Labor & Employment Breakfast Series:

Top Ten Ways Employers Get Sued and How to Avoid Them
Philadelphia: September 20, Four Seasons
Baltimore: September 22, Four Points Sheraton

Avoiding FLSA Problems
Philadelphia: November 15, Four Seasons
Baltimore: November 9, Four Points Sheraton

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For more events, and video of past seminars and webinars, please visit www.offitkurman.com/news-events/

COMMENTS BY EMPLOYEES ON FACEBOOK - MORE PROTECTED THAN YOU MIGHT THINK

BY: HOWARD KURMAN, ESQ.

In November, 2010, the National Labor Relations Board issued a complaint (similar to a civil lawsuit) against American Medical Response of Connecticut, alleging that the Company illegally fired an employee for posting derogatory comments about her supervisor on her personal Facebook page. In fact, the employee posted a comment about her supervisor in which she referred to her supervisor as a "17", Company jargon for a "mental patient". When other co-employees saw her posting, they commented derogatorily about the Company, which, in turn, further precipitated more unfavorable comments from the employee. The Company, not appreciating the employee's nasty comments, subsequently fired the offending employee. After she was terminated, the employee filed an unfair labor practice charge with the NLRB, contending that her comments constituted "protected concerted activity" under the National Labor Relations Act (the "Act")

The Employer contended that its blogging and internet policy clearly and broadly prohibited employees from making disparaging, discriminatory or defamatory comments when discussing management or the Company. The Board, in issuing the Complaint against the Company, alleged that not only had the Company violated the terminated employee's rights to engage in "protected concerted activity" under the Act, but had also illegally maintained a policy that improperly constrained employees from discussing wages, hours and terms and conditions of employment, historically protected under the Act for non-union, as well as unionized employees.

Before the case went to scheduled trial on January 25, 2011, the Board and the Company settled the case. In a press release dated February 7, 2011, the NLRB announced a settlement of the case under which the Company agreed to revise its internal policies so that they do not improperly restrict employees from discussing their wages, hours and working conditions, even during non-work time, and that employees would not be disciplined for engaging in such protected activity.

While no definitive decision was reached in this case because of the settlement, it is clear that the activist NLRB (now dominated by Democrats) will be pursuing its own pro-employee/ union agenda for the foreseeable future, and that employers will not be receiving the same deference that they might have received during the Bush administration. From a practical perspective, it behooves all employers to work with their employment counsel to closely scrutinize their Employee Handbooks and Social Networking policies to make sure that limitations on employee activities and comments do not impermissibly cross a line that may well be found to be violative of the National Labor Relations Act. We encourage you to speak to us about your existing or contemplated policies on workplace discussions, social networking and electronic monitoring to assure compliance with what assuredly will be an evangelistic and anti-business NLRB under President Obama.

Howard Kurman is a Principal and Chair in Offit Kurman's Labor & Employment Practice. If you wish to discuss this matter further or you have any questions about this case, please feel free to contact Howard at (443) 738-1517 or hkurman@offitkurman.com.

COURT RULES THAT HIGHER STANDARD IS REQUIRED FOR DEFAMATION CLAIM AGAINST FORMER EMPLOYER GIVING NEGATIVE EMPLOYMENT REFERENCE

BY: LAURA L. RUBENSTEIN, ESQ.

In an unpublished decision by the Fourth Circuit on March 15, 2011, the court held that in Maryland, an employer is not liable for disclosing information about a former employee's job performance unless it is shown by "clear and convincing evidence" that the employer acted with "actual malice" or "intentionally or recklessly disclosed false information."

In *Spence v. NCI Information Systems, Inc.* (Case No. 09-1391), the plaintiff alleged that his former supervisors made defamatory statements to his prospective employer, the Air Force, when he applied for a position that required an extensive background investigation. When his three former supervisors were interviewed about Plaintiff's performance at NCI, the first supervisor said that he would not recommend the Plaintiff for any position related to computer forensics because the plaintiff lacked the ability to work with others and often failed to meet the requirements set forth by supervisors and customers. Although not violent, Plaintiff was often rude to co-workers and customers. The supervisor feared that the plaintiff had a vindictive attitude.

The second supervisor said that Plaintiff was not well liked within the workplace. Plaintiff was friendly with coworkers, but often lacked some of the social skills needed to successfully complete the mission. Plaintiff maintained a good relationship with male employees, but possessed a disrespectful and somewhat chauvinistic attitude toward female employees, specifically his superiors. On one particular incident, Plaintiff initiated a fist fight with a male co-worker in the office. Plaintiff possesses a temper and could possibly be vindictive. She would not recommend Plaintiff for a computer forensics position.

The third supervisor reported that Plaintiff was completely unreliable, untrustworthy, and frequently failed to meet deadlines set forth by the management. He adamantly stated he would not recommend Plaintiff for any position, and Plaintiff was not welcome for a position with NCI in the future.

Plaintiff sued NCI for defamation and false light invasion of privacy based on the interview statements of the three supervisors.

Maryland law states that claims of defamation and false light against an employer are subject to a conditional privilege in Maryland. In other words, an employer may generally disclose information about a former employee's job performance to an inquiring prospective employer. To overcome this conditional privilege, a plaintiff must prove by "clear and convincing evidence that the employer" either "acted with actual malice" or "intentionally or recklessly disclosed false information."

In this case, the plaintiff failed to produce evidence that any supervisor made the statements with malice or disregard for the truth. Malice cannot be established if there is evidence to show that the speaker acted on a reasonable belief that the defamatory material was substantially correct and there was no evidence to impeach the speaker's good faith. Thus, the court reasoned that the statements in the Air Force's background report were deemed conditionally privileged under Maryland law.

This decision allows employers seeking information about their prospective employee the liberty to pursue more detailed information (other than the proverbial name, rank and serial number), so long as the appropriate questions are asked. Similarly, it significantly decreases the liability when a company representative answers questions truthfully about a person's performance and discusses why a company would not rehire or recommend employment for a former problem.

Laura L. Rubenstein is a Principal in Offit Kurman's Labor & Employment Practice. If you wish to discuss this matter further or you have any questions about this case, please contact Laura at (301) 575-0333 or lrubenstein@offitkurman.com.

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Howard K. Kurman is Chair of Offit Kurman's Labor & Employment Department. Mr. Kurman regularly counsels clients on all aspects of proactive employment/labor issues. He represents employers ranging in size from as small as 20 employees to those employers with geographically disparate locations consisting of over 4,000 employees. Howard can be reached at (443)738-1517 or hkurman@offitkurman.com

Laura L. Rubenstein is a Principal in Offit Kurman's Labor & Employment Department. Her practice concentrates in representing corporate clients and non-profit agencies in a wide range of matters including the defense of state and federal discrimination claims, workplace and sexual harassment charges, ADA and ADEA claims, wage and hour issues, FMLA disputes, employment contracts; and employment-related and other business tort claims. Laura can be reached at (301) 575-0333 or lrubenstein@offitkurman.com.

ABOUT OFFIT KURMAN

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We have offices conveniently located across the Mid-Atlantic region, including Philadelphia, Baltimore, Washington DC, and Wilmington, DE. For more information about Offit Kurman, please visit us on the web at www.offitkurman.com.