**Teaching Note: In your face(book): Social Media and unfair Labor Practices**

**Critical Incident Overview**

In Your Face(book) presents a decision-based case involving employee and employer rights and obligations with social media communications, particularly in a union context. It is written from secondary sources of data. Jimmy John’s franchise stores owed by MikLin Enterprises Inc. were the subject of an unprecedented union campaign. Workers sought improved working conditions, with sick leave as their top priority. Eventually, employees threatened to go public with their campaign for sick leave benefits using a contentious poster. The poster shows two identical sandwiches, one purportedly made by a healthy worker, the other a sick worker. The poster then states, “Can’t tell the difference? That’s too bad because Jimmy John’s workers don’t get paid sick days. Shoot, we can’t even call in sick.” This prompted Rob Mulligan, co-owner of MikLin Enterprises Inc., to post a comment to an Anti-Union Facebook page, created by a rank and file employee, encouraging members of the Facebook group to take the sick day posters down. A barrage of vituperative comments by various Jimmy John’s managers followed.

This case challenges students to look at the legalities of employees’ and employers’ use of social media. In addition, the case asks students to look at managerial and ethical issues involved in the use of social media and to formulate a social media policy.

**Learning Objectives**

The case objectives are to:

1. Assess the rights and restrictions on speech by management when employees are engaged in concerted activity under labor law.
2. Appraise managerial and ethical considerations in reacting to managers’ use of social media.
3. Formulate a social media policy for a business applying legal and business considerations.

The case can be used in a variety of undergraduate courses dealing with business law, ethics and multiple management courses included labor relations, collective bargaining, and human resources. In law courses, the case would complement material on the employment environment, specifically labor management relationships. In management courses, the case can be made part of a discussion on employee policy development, retaliation, social media, and labor law.

**Research Methods**

This case is not disguised.  It is written from publicly available secondary sources.

**Questions**

The following questions can be used to guide class discussion of the case:

1. In the heat of a labor relations dispute is the offensive dialogue used in the Facebook posts illegal?
2. Can management through social media legally encourage the removal of the sick day posters?
3. What ethical and managerial considerations should be taken into account in responding to the managers’ use of social media? How should MikLin Enterprises, Inc. respond to the managers’ speech?
4. What issues should be addressed in a social media policy? Propose a social media policy for Jimmy Johns.

**Answers to Questions**

1. *In the heat of a labor relations dispute, is the offensive dialogue used in the Facebook posts illegal?*

Under the National Labor Relations Act (NLRA), employers are forbidden from interfering with or restraining employees from working together to improve terms of employment and workplace conditions. The freedom to speak, however, is specifically protected under the law. Section 8(c): provides“[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit.” The legal protection for words that are solely disparaging is not clear.

The NLRB decisions on disparaging speech are ambiguous. One line of cases suggests that words of disparagement alone are protected free speech; whereas, another Board seemed to say that disparagement directed at employees constitutes an unfair labor practice.

A number of NLRB Board decisions opine, “[w]ords of disparagement alone” are insufficient for finding an unfair labor practice. The National Labor Relations Board (NLRB) decision in *Sears, Roebuck and Co.* illustrates this point (Sears, Roebuck and Co. 1991). Therein the Regional Employee Relations Manager for Sears told employees that the Union might send someone out to break their legs in order to collect dues. In analyzing the statement, the Board first determined that the employee’s statement was not a threat. To be an illegal threat, the speaker must have the power to carry out the threatened action. As the manager was ascribing violent activities to the union, not Sears, his statement was not a threat. Without more, the Board characterized the comments as “flip and intemperate,” but found them to be “expressions of [the managers] personal opinion protected by the free speech provisions of Section 8(c)” (Sears, Roebuck and Co. 1991).

Taking this same position, the Board in *Trailmobile Trailer* stated “[i]t is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations.” In light thereof, the Board allowed the following disparaging comments by the manufacturing manager to various employees that:

* he could teach monkeys to weld;
* he could replace all the painters within 10 minutes;
* people in the union were stupid;
* the union was “using” the Union Steward; and
* a union representative was “worthless and no good.” (Trailmobile Trailer 2004).

The human resources manager’s degrading and demeaning comments were similarly tolerated:

* to the Union Steward, the manager asked if she was the International Representative’s “messenger boy” and that he hoped she was not doing something “underhanded.”
* In front of a group of employees, the manger described the International Representative as a “fat ass, “who was “living it up at the Holiday Inn on the employees’ dues.”

In contrast to these decisions, the Board in *Romal Iron Works Corp* said, “the malicious use of ridicule and scorn impacts directly on a person’s sensitivities and it is natural for one to avoid being made the object thereof;” consequently, the court concluded that such conduct “interferes with, restrains and coerces employees in the exercise of their [rights to engage in concerted action].”

Although not articulated in this manner, the difference between the lines of cases might be whether the comments constitute harassment. The following dictum is found in a number of the Board decisions, “[a]n employer’s right to speak is not unlimited though; comments which explicitly or implicitly convey threats, suggest the employees’ activities are futile or constitute harassment violate the law (Sears, Roebuck and Co. 1991).” In *Romal Iron Works Corp*, the speech fit within the general context of harassment as it involved egregious racial slurs including the n-word. Harassment has not been specifically addressed by the Board. Another basis for the divergence in the cases might be the target of the speech. Greater latitude may be given when the remarks are directed toward the union or union officials, as opposed to employees.

Whether the vituperative Facebook comments by Jimmy John’s management are protected speech or an unfair labor practice is not clear. The law should be viewed as setting the base line for behavior. Thus, notwithstanding the uncertainty of the law, MikLin’s course of action should be guided by ethics.

1. *Can management through social media legally encourage the removal of the sick day posters?*

Under the National Labor Relations Act (NLRA) employees have the right to engage in “concerted activity” (National Labor Relations Act §7, 2000). This right exists even if there is no union. What this means is that non-union employees can join together to take action, including public dissemination of information, in an effort to improve terms of employment and workplace conditions. To insure these rights, employers are forbidden from interfering with or restraining employees from working together (National Labor Relations Act §8, 2000). Thus, employers cannot instigate the tearing down or removal of informational posters. Rob Mulligan’s Facebook post encouraging others to take the sick day posters down interfered with employee rights and constituted a violation of the NLRA.

1. *What ethical and managerial considerations should be taken into account in responding to the managers’ use of social media? How should MikLin Enterprises, Inc. respond to the managers’ speech?*

Numerous ethical and managerial considerations should be taken into account in determining a course of action. Ethical considerations focus on leadership tone and corporate values; managerial considerations include employee morale and reputation.

Strong ethics is vitally important to business. The strength and longevity of a business can be tied to ethical behavior. In creating an ethical culture, leadership tone is paramount. The CEO and other managers must exemplify the company’s values.

Undoubtedly, MikLin Enterprises and Jimmy John’s reputation was tarnished by the Facebook posts. With strong leadership, MikLin’s management can through a course correction establish an ethical culture winning back its good reputation and employee morale. MikLin should start this process by articulating the values which will guide the business. Among the values that MikLin should embrace are integrity, honesty and respect. After identifying the values, MikLin must create the expectation that its employees will follow the values along with mechanism for enforcing expectations and rewards for commitment to ethics. Specifically, MikLin should adopt a written Code of Ethics/Conduct. The corporate values, ethics and code should be part of the orientation program for new employees with ongoing training for all employees.

Most importantly, Mike Mulligan, president of MikLin Enterprises Inc., and the other owners must live the values. Employees will emulate the owners’ conduct. Once employees are convinced of the change in culture, morale will be boosted.

Beyond a statement of values, MikLin might consider a adopting a Harassment Prevention Policy and a Social Media Policy with explicit provisions on cyber-bullying. Such policies would offer managers specific guidance and direct behavior.

With respect to the repugnant Facebook posts by the co-owner and mangers, MikLin should require that they be redacted. Further, management should use the Jimmy John’s Anti-Union Facebook page to present its views, argument, or opinion on the substantive issues regarding the union in an honest and respectful way. To insure that the Facebook page is being utilized properly, a training session on the law and the company’s values should be held with all managers and assistant managers.

1. *Identify the issues that should be addressed in a social media policy. Propose a social media policy for Jimmy Johns.*

In devising a social media policy, the following subjects should be taken into consideration:

* the protection of concerted activities under the NLRB;
* protection of the company brand and reputation;
* the use of social media in the workplace;
* infringement of the business’ intellectual property rights;
* cyberbulling and online harassment;
* privacy;
* data protection;
* consequences for violations.

In light of the focus of this critical incident, this discussion centers on the social media policies and the NLRB. Of late, the NLRB has targeted social media. It is quite evident that organizations need to avoid social media policies that are so overbroad, vague, ambiguous that they could be viewed as prohibiting activities protected by the NLRB. Non-supervisory employees have the right under the NLRB to discuss wages and working conditions among employees.

Regarding overbroad, MikLin's policy needs to limit the scope of its policies and include clear definitions of its policy terms that won't be easily misinterpreted and avoid ambiguity.  MikLin can do this by: including examples of both prohibited and acceptable practices; creating a context for policy interpretation; and showing its employees how the policy correlates with labor regulations.  For example, MikLin's policy could state that discriminatory remarks, bullying, harassment, threats of violence and similar inappropriate behavior that is not tolerated in the workplace, is not tolerated in social media.  A statement of this sort is a natural extension of common labor practices, gives employees a context and is adequately defined.

Further components of a MikLin Social Media policy could restrict employees from using social media for personal use during company time with company equipment, unless authorized.   MikLin could make a policy statement that encourages employees to resolve workplace grievances internally, inviting them to refrain from making posts that could be viewed as obscene, threatening, intimidating, malicious, or would create a hostile work environment on the basis of race, color, creed, sexual orientation, age, disability status, religion or other protected status, if they choose to air their grievance using social media.  Any policy created, however, cannot discourage non-supervisory employee participation in social media by threatening reprisals against employees who post disparaging remarks against the employer.  Employees are allowed to speak, post and vent about their employer if speaking on behalf of a group of employees with the intention of improving work conditions. The Appendix contains a sample policy endorsed by the NLRB (NLRB Report).

**Epilogue**

Jimmy John’s fired six of the employees involved in the sick leave campaign and issued final written warning to four others. In response, the workers filed an unfair labor practice complaint with the NLRB (Moylan, 2011 & Hughlett, 2011) claiming among other things that the Facebook posts illegally interfered with, restrained and coerced employees in exercising their rights to engage in concerted activities. The NLRB agreed with the employees and charged MikLin with unfair labor practices (NLRB Complaint 2011). On April 20, 2012, administrative law judge Arthur Amchan ruled on the legality of the social media messages (Miklin Enterprises 2012). Only one aspect of the Facebook dialogue was found to run afoul of the law. The offending post was the one whereby Assistant Manager Rene Nichols encouraged employees and managers to text David Boehnke, the union activist. The NLRB judge wrote, “[b]y encouraging employees and managers to text David Boehnke without any specification of what they should communicate to Boehnke, Nichols was encouraging other employees and managers to harass Boehnke for activities ~~that~~ that were protected, as well as some that were arguably unprotected” (Miklin Enterprises 2012). The judge further noted that Rob Mulligan’s posts on Facebook condoned such harassment. The disparaging comments about David Boehnke including, F\*\*k You David Forever,” name-calling—“unibrowner,” and applauding a photograph of David with feces on his cap, were found to be legal. In reaching this decision, the judge echoed the position that the law “countenances a significant degree of vituperative speech in the heat of labor relations” and that words of disparagement alone concerning a union, its officials or supporters were insufficient for a violation.” According to this judge, for disparaging posts to be an unfair labor practice they needed to convey explicit or implicit threats, suggest that the employees’ union activities are futile or constitutes harassment. MikLin Enterprise has filed an exception to these findings.

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**Appendix**

**Social Media Policy\***

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer, or one of its subsidiary companies in the United States ([Employer)).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

**GUIDELINES**

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with[Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer) policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's) legitimate business interests may result in disciplinary action up to and including termination.

**Know and follow the rules**

Carefully read these guidelines, the (Employer) Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

**Be respectful**

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer). Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

**Be honest and accurate**

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer), fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

**Post only appropriate and respectful content**

•Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

•Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.

•Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.

•Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

**Using social media at work**

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer) email addresses to register on social networks, blogs or other online tools utilized for personal use.

**Retaliation is prohibited**

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

**Media contacts**

Associates should not speak to the media on [Employer's] behalf without contacting the

Corporate Affairs Department. All media inquiries should be directed to them.

**For more information**

If you have questions or need further guidance, please contact your HR representative.

\* National Labor Relations Board Report Update on Social Media of the Acting General Counsel referring to the Advice Memorandum in Walmart Case 11-CA-067171(2012, May 30).

**References**

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