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Commentary

Social media and the workplace: takeaways from 'Beagan'

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The Rhode Island Supreme Court on June 19 issued its first decision discussing the burgeoning and unsettled topic of social media in the employment context.

In *Beagan v. R.I. Department of Labor and Training, et al.*, the court ruled there was insufficient evidence that a former employee's Facebook post complaining about his boss was connected to his work and thus could not form the basis for the denial of unemployment benefits under G.L. §28-44-18.

The court quashed a prior District Court ruling and remanded with directions to award benefits.

While *Beagan* may be the court's first foray into the complex interplay between social media and employment law, it almost certainly will not be its last. Below are three takeaways from the decision.

1. The court declines to find a connection here between Facebook posts and the workplace, but hints at circumstances in which a connection may exist.

In ruling under the facts of the case in *Beagan* that an employee's Facebook posts were not connected to his work, the Rhode Island Supreme Court offers hints and potential guidance to employers and employees as to factors it may consider in connecting social media posts and the workplace.

The relevant facts in *Beagan* are easily summarized:

In March 2013, Beagan was terminated from Albert Kemperle, Inc. after four years on the job. Shortly before his termination, a dispute had arisen between Beagan and his boss, Morancey, concerning Beagan's refusal to sign API's new internal company policy relating to accidents, and about overtime pay.

After a confrontation in which Beagan was nearly fired, but instead issued a written warning, Beagan left the office to make deliveries, but not before commenting to Morancey that he could write whatever he wanted on Facebook and that Morancey would not be able to see what he wrote because Beagan had blocked him.

After Beagan left, Morancey asked an anonymous third party to access Beagan's Facebook page. In a post made while Beagan was out making deliveries, Beagan stated, "It's a good thing my boss doesn't take things personal and wanna, like, know if I wrote [stuff] about him. I sometimes forget that despite [the] fact he walks and talk[s] like a real person, he isn't a real boy, Geppeto [sic]."

When Beagan returned from his deliveries that same day, he was fired.

After being denied unemployment benefits at several rounds of administrative appeals, Beagan eventually appealed to the District Court. In affirming the denial of benefits, the District Court judge found a connection between the Facebook post and Beagan's work, as required to deny unemployment benefits under §28-44-18, on the basis that Beagan "baited Morancey into searching out his Facebook page."

The Supreme Court was unpersuaded by the District Court judge's decision, declining on the facts of the case to find a connection between Beagan's Facebook posts and his work.

The court's analysis suggests eight questions to ask in determining whether a social media post is connected to the workplace:

- Did the post specifically identify the employer or any manager, employee or customer by name or otherwise?
- Was the post directly accessible to the employer or any manager, employee or customer?
- Did the employee takes steps on the social media platform, such as through "blocking," to prevent the post from being directly accessible to the employer or any manager, employee or customer?
- Did the employee author the post on any electronic device belonging to his employer?
- Did the content of the post relate to or impact the employee's job performance?
- Was the post made in a manner or at a time that could negatively impact job performance or safety, such as while driving or while performing job duties?
- Did the employee author the post while "on the clock"?
- Did the employer have a written social media policy?

The Supreme Court in *Beagan* answered each of those questions either in the negative or otherwise determined that there was insufficient evidence to answer in the positive.

In making its decision, however, the court hinted that evidence in support of the factors could play a role in determining under Rhode Island law whether an employee's social media activity is sufficiently connected to her work.

Employers and employees should keep the factors in mind in evaluating the impact of social media activity on the employment relationship and deciding how and when to engage on social media.

2. The court has a good understanding of Facebook and social media.

The ubiquity of social media and cellphones has forced government officials, judges and public policymakers to better understand the technology and its capabilities.

We've come a long way since the late Alaskan Sen. Ted Stevens, in a 2006 speech on the floor of the U.S. Senate, described the internet in a great moment of unintentional comedy as a "series of tubes." Eight years later, in 2014's unanimous decision in *Riley v. California*, 134 S.Ct. 2473, the U.S. Supreme Court, recognizing powerful new cellphone technology and the increased expectations of privacy it engendered, stated: "[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate."

Now, with social media often accessed through cellphones, not only can you keep a record of virtually every aspect of your life, from the mundane to the intimate, you also can post it for everyone to see.

The Supreme Court demonstrates in *Beagan* a familiarity with social media and, in particular, Facebook. The court has recently confronted Facebook on several occasions in the criminal law context. See, e.g., *State v. Roldan*, 131 A.3d 711 (R.I. 2016) (affirming conviction in case involving confrontations and threats on Facebook); *State v. Moore*, 154 A.3d 472 (R.I. 2017) (affirming conviction in case involving numerous Facebook messages and where law enforcement allowed witness to access Facebook to identify perpetrators).

In reaching its decision in *Beagan*, the court noted that (1) the employee never mentions his boss or his company by name in his Facebook posts; (2) the employee "blocked" his boss from his Facebook page; (3) there is no evidence that the Facebook posts were accessible to any of the company's other employees, associates or customers; and (4) the boss accessed the employee's Facebook page through an anonymous third party.

The court recited those facts, which suggests a good understanding about how Facebook works, in deciding that the Facebook posts were not connected to the workplace under Rhode Island law.

3. Companies should have a social media policy.

The Supreme Court suggests that the outcome in *Beagan* may have been different had the employer had a written social media policy. The court cites to *Kirby v. Washington State Dept. of Employment Security*, 342 P.3d 1151, a Washington state case affirming an unemployment benefits award following an employee's discharge for a Facebook post she made where, among other things, the employer did not have a social media policy for the workplace.

Employers should consult with an employment lawyer and update their written employment policies to include provisions relating to social media, and employees should be aware of their workplace social media policy to avoid or, if necessary, respond to any potential dispute with their employer.

A company's social media policy should, at the very minimum, include provisions relating to the following:

- No discrimination, harassment or threats. The social media policy should provide that posts involving discriminatory remarks, harassment, and threats of violence or other inappropriate or unlawful conduct on social media are not tolerated. The policy also should cross-reference to the employer's other policies relating to discrimination, harassment, retaliation, ethics and other related areas.
- Respect for co-workers and customers. The social media policy should state that employees should be fair and courteous on social media to the people they work with, including co-workers, managers, support staff, customers, suppliers and independent contractors. The policy should require employees to avoid posts that are malicious, obscene, intimidating, bullying or disparaging or that could contribute to a hostile work environment on the basis of race, sex, disability, religion, sexual orientation or any other status protected by law or company policy.
- No disclosure of confidential information or trade secrets. The social media policy should instruct employees not to disclose through social media or otherwise any confidential or proprietary information or trade secrets. Depending on the company, trade secrets can include, among other things, customer lists, technological processes, product specifications, financial data, supplier information and strategic plans. Social media posts revealing confidential and proprietary information or trade secrets can damage the company's competitive advantage and can make it more difficult to protect trade secrets in any future dispute.

Conclusion

Social media, by its very nature, is a powerful tool that breaks down traditional boundaries between the public and private. It also strains the traditional divide between work life and personal life, and the attendant rights and responsibilities in both spheres.

Courts like the Rhode Island Supreme Court in *Beagan* will continue to be confronted with the challenge of applying traditional legal principles — including the complex web of federal and state labor and employment laws — to a changing world. It's a world in which the virtual and the real are often one and the same. RILW

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