

GUIDANCE ON SOCIAL MEDIA



National Institutes of Health
Office of Equity, Diversity, and Inclusion



Objectives & Overview

Employee Use of Social Media

Manager and Supervisor
Responsibilities

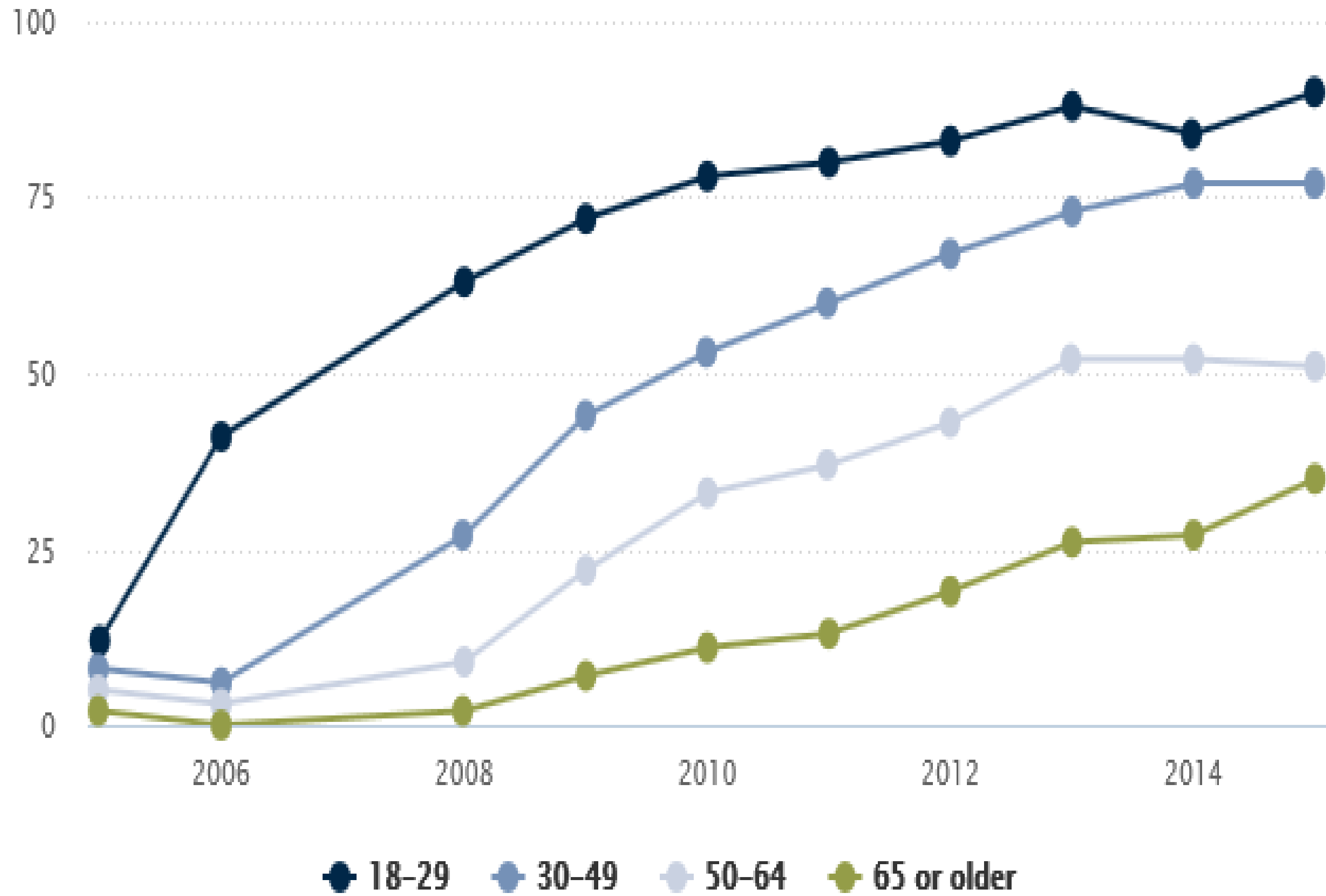
Agency Liability



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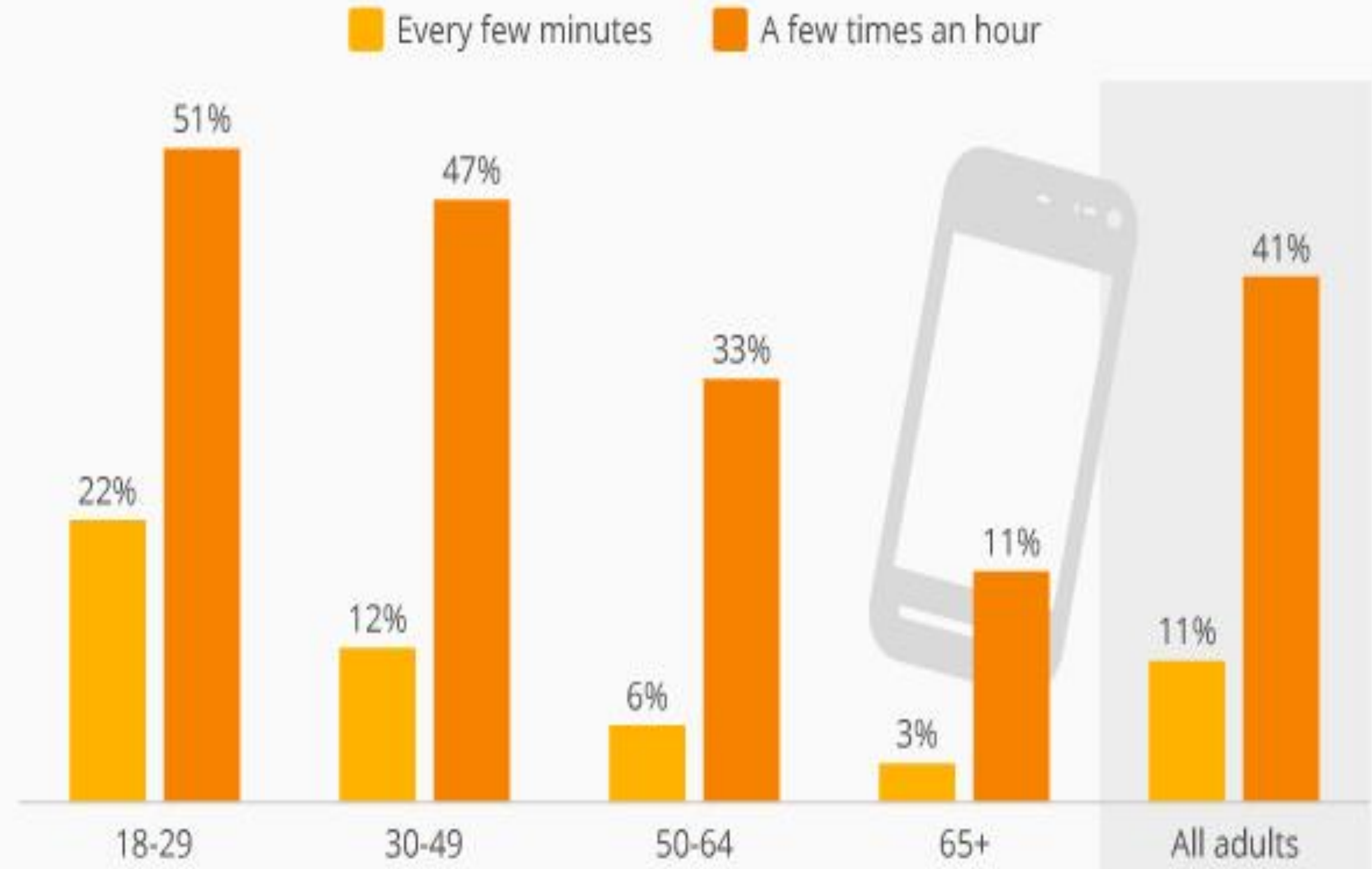
Social Media Usage by Generation

Among all American adults, % who use social networking sites, by age



America's Growing Smartphone Addiction

% of American smartphone owners who check their phones at least several times an hour



Frequency of Use



@StatistaCharts

Based on a survey among 15,747 smartphone owners conducted April 17-May 18, 2015

Source: Gallup

What is Social Media?

“Media” are instruments of communication. Traditionally, media refers to newspaper, radio, or television outlets.

Smartphones and other electronic devices now provide alternative means of communicating information.

“Social” refers to the relationships among individuals and groups in society. So social media are interconnected, multi-directional means of communication to share information, preferences, and views among individuals and groups. Examples include:

- Facebook
- Twitter
- Instagram
- LinkedIn

Legal Definition of Social Media

- Online communications in which individuals shift fluidly and flexibly between the role of audience and author
- Encompass many of the features of social networking
- Members create online profiles that they use to “become part of an online community of people with common interests”

Challenges with Social Media

- Blurring of lines between “work” and “personal”
- Blurring of lines between “friends” and “lines of authority”
- No “filter” or “edit”
- Reach a vast audience
- Immediate public viewing
- Quicker and less “formal” = users are less guarded and careless

Social Media Activities

The courts have determined employee personal social media use can fall under:

- **Protected Activities** (instances in which leadership cannot discipline),
or
- **Unprotected Activities** (instances in which leadership must discipline when they are aware)

Employees have the right to discuss or protest terms and conditions of employment where:

- ✓ Two or more employees involved, or
- ✓ One employee is acting on behalf of others or discusses with others before acting

Protected Social Media
Activities

Protected Activity – Complaints About Work are OK

- Mariana's Facebook Page - Saturday, October 9, 2010 -

10:14 a.m.: Mariana: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?"

10:19 a.m.: Damicela: "What the [blank] Try doing my job I have 5 programs."

10:26 a.m.: Ludimar: "What the [blank], we don't have a life as is, What else can we do???"

11: 11 a.m.: Yaritza: "Tell her to come do mt [my] [blank] job n c if I don't do enough, this is just dum."

11:41 a.m.: Carlos: "I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching TV, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)"

Outcome:

- All 5 employees were fired for participating in this exchange
- Court held: in favor of the 5 employees NLRB found an Unfair Labor Practice
- Employees were talking about their workload = protected as collective bargaining and mutual aid and protection
- Finding – discriminatory discharge of employees – offered reinstatement and back pay plus interest

Unprotected Social Media Activities – Even Private Use

- Disparaging or defamatory comments about employer, employees
- Trade secrets or Classified information
- PII information
- Unlawful harassment protected categories under Title VII

Unprotected Activity – Race Discrimination

- Complainant was an African American Air Traffic Control Specialist at FAA
- Lunch runs – Air Traffic Controllers take turns getting lunch
- Complainant was asked to do the food run one day - Chick-fil-A
- Later that day co-worker posted to his Facebook page - "would make the next food run to a racist restaurant and see if his Black [expletive] wants to complain. If he does, I will laugh in his face."
- Co-worker was upset about the choice of Chick-fil-A because he deemed it to be an anti-gay establishment
- Complainant filed an EEO complaint - harassment and a hostile work environment based on race, sex and in reprisal for prior activity
- EEOC held that a single incident that is race based can be enough to support a harassment/hostile work environment claim – must be severe

Unprotected Activity – Threats

- Complainant was a Laborer on Tyndall Air Force Base, Florida - terminated
- EEO complaint alleging race (Asian) discrimination
- Love Triangle - Complainant was previously married to another agency employee, AC, a Custodial Worker. Complainant and AC were divorced and had one child. Complainant sent AC numerous text messages that expressed his displeasure with AC's boyfriend spending time with their son.
- Complainant posted several threatening messages on Facebook
- Complainant also had a history of abuse against AC
- On his day off Complainant came to the workplace to deliver some court papers to AC. AC, claiming she was frightened, refused to speak with him and locked herself in a room. Complainant knocked on the door. Security was called, but Complainant left.
- Complainant was removed for: conduct unbecoming a federal employee and a violation of the Agency's policy on workplace violence.
- EEOC Held: No discrimination, Facebook speech was not protected

Agency Disciplinary Actions

- Protected Private Social Media Activities – Can't Discipline
- Unprotected Private Social Media Activities Like Discriminatory Harassment – Must Discipline
- Must correct and cure discriminatory harassing behavior on social media if you become aware and if it can impact other employees.
- Correct and cure so that it does not happen again.

If agency managers and supervisors do not prevent or act to stop social media comments that fall under the 'un-protected' category ...

... The agency can be liable for not correcting and curing the illegal discrimination once on notice...

Agency Liability

Example Case Study

- Plaintiff is a person with a physical disability
- Co-workers started two blogs
- Posted critical and spiteful comments about Plaintiff
- Plaintiff, complained repeatedly to management of the blog posts – alleging harassing conduct
- Employer did not sponsor or endorse the blog or participate in it in any official way
- Management made some meager efforts to get the co-workers to stop
- Plaintiff filed a lawsuit alleging disability-based harassment
- Court held that the County was liable and awarded Plaintiff nearly \$1 million

Deciding to Act

- If a manager/supervisor is friends with or follows an employee on social media and sees discriminatory content or an employee brings it to the manager's attention that discriminatory content appears on social media; AND
- Other employees are also friends or follow the NIH employee on social media; AND
- The social media private account holder engages in unlawful harassing speech; THEN
- Supervisors/Managers must act! OR
- The agency could be liable for not correcting and curing the illegal speech once on notice.

Discussion
and/or
Questions?





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