

## You're fired because of Facebook: tips for employers on navigating the fast-growing social media frontier

Not long ago, an employee's complaints about his employer were traded with a few co-workers huddled around the water cooler on Monday morning. But now those complaints are going viral: shared over the Internet at break-neck speed with hundreds of an employee's friends and followers on Facebook and Twitter.

As the use of social media only expands, employers must grapple with a host of new issues. Understandably, employers are concerned about protecting their companies' goodwill and reputation. Plus, they expect some loyalty and self-restraint from their employees, whom they treat well and provide a steady paycheck. Whereas once an employee could privately reflect on his concerns and hopefully see those concerns subside or devise a constructive resolution, now that employee can press "post" in a fit of frustration and immortalize his possibly passing complaints on the Internet for a wide audience to see.

So what can a company do to ensure that its employees respect the company brand and think before they hit "post"? Is it advisable to discipline employees for their offensive social media conduct?

Until now, these questions remained largely unanswered in the world of law. But now the National Labor Relations Board has provided some guidance. In an Aug. 18 memorandum, the board's general counsel summarizes the outcome of 14 investigations into social media cases. The cases offer substantial insight into how the board analyzes social media cases.

An important note to remember: the National Labor Relations Act (NLRA) covers most employees in the private sector — *not just* employees who are represented by a union. As such, most private-sector employees have a right to engage in "protected concerted activity," which is when two or more employees take action for

their mutual aid or protection regarding terms and conditions of employment. A single employee can also engage in protected concerted activity if he acts on the authority of other employees, brings group complaints to the employer's attention, seeks to prepare for group action or tries to induce group action.

### When to Discipline an Employee for a Social Media Post

The general counsel's memorandum summarizes four cases in which an employee's social media conduct was found to constitute protected concerted activity:

- While preparing for an anticipated meeting with management, an employee asked co-workers on her Facebook page to comment on another employee's ongoing complaints about job performance and staffing issues at the employer;

- After her request for union representation went unanswered, an employee complained on her Facebook page about her supervisor's refusal to allow a union representative to assist her in responding to a customer service complaint about the employee;

- A luxury car salesman complained on his Facebook page about a sales event hosted by his employer to introduce a new car model. He voiced the disappointment of several salespeople that their employer had served inexpensive food and beverages at the event, and he posted several tongue-in-cheek photographs of his co-workers at the event, including a photograph of a co-worker near the "overcooked hotdogs and stale buns";

- In a conversation seen by an employer's customers, employees of a sports bar and restaurant participated in a Facebook conversation about their employer's failure to withhold state income taxes, and one employee referred to an owner of the restaurant as "[s]uch an [a--]hole."

In each of these cases, employees posted on Facebook on their own time and using their own

computer equipment, although this factor was not considered determinative in any of the cases.

### Were the Employees Mentioning Their Working Conditions?

When viewed together as a group, the cases have common threads that provide insight into how the board approaches social media cases. Importantly, the subject matter of the Facebook posts related to one of the following: the terms and conditions of employment, the exercise of rights conferred by the NLRA, or other matters traditionally considered "protected activity" under the board's precedent. The topics included: (1) preparing for an expected meeting with management concerning employees' job performance and workload; (2) the right to union representation in a unionized workplace during an employer's investigation of an employee; (3) conduct by an employer that could have impacted — even slightly — an employee's compensation or sales commissions (the car salesman were "concerned about the impact the employer's choice of refreshments would have on sales and therefore, their commissions"); and (4) the employer's administration of income tax withholdings, which caused employees to pay increased state taxes. Each of these subjects concerned the terms and conditions of employment or touched upon other matters and rights commonly found to be protected.

By contrast, the general counsel found certain social media posts to involve topics that were not protected. Therefore, the employees' discipline (usually termination) was justified. In one case, a newspaper reporter used social media to criticize various local matters that were not related to his working conditions, such as criticisms of an area television station. In another case, a recovery specialist had a conversation with friends on her Facebook page, where she wrote that it was "spooky" working alone overnight at the mental institution, and that one of her clients was "cracking

her up" because the employee "did not know whether the client was laughing at her, with her, or at the client's own voices." The general counsel wrote that the recovery specialist's Facebook posts did not discuss her working conditions; rather, she was "merely communicating with her personal friends about what was happening on her shift." Therefore, these social media conversations were not protected, and the employees' discipline was justified. Interestingly, the recovery specialist was the only employee in the 14 cases summarized by the general counsel who wrote on Facebook while she was at work. However, this factor was not determinative in finding her termination justified — rather, the key fact was that her posts did not mention her working conditions.

### Were the Employees Collaborating or Engaging in "Concerted Activity"?

Equally significant, in each of the four cases where protected activity occurred, the employees were collaborating, or engaging in "concerted activity" for their "mutual aid and protection." In the first case, an employee was seeking assistance from co-workers while preparing for a meeting with management. In the second case, an employee was protesting supervisory actions with co-workers who were her Facebook friends. In the third case, an employee was vocalizing the sentiments of his co-workers about his employer's sales event. And, in the final case, employees were sharing concerns about their employer's failure to withhold state income taxes. None of these cases could be said to concern merely individual gripes, but rather embodied "truly group complaints" and, in some cases, also contemplated future group activity.

By contrast, the general counsel described several cases that did not involve concerted activity. In one, a bartender was fired after posting a message on his Facebook page that mentioned his employer's tipping policy, in response to a question from a

non-employee. The general counsel found that, although the bartender's Facebook post addressed the terms and conditions of his employment, the activity was not "concerted" because he did not discuss the post with his co-workers, no co-workers responded to the post, and there had not been "employee meetings or any attempt to initiate group action concerning the tipping policy or raises." As such, his termination was lawful.

In another case, the general counsel found insufficient evidence that an employee had engaged in concerted activity when he made Facebook comments that were critical of local store management. Although several co-workers responded to his Facebook post by expressing emotional support and asking why he was so "wound up," the general counsel did not find that concerted group activity had occurred: the post contained no language suggesting that the employee wanted to induce his co-workers to engage in group action, and none of the co-workers' Facebook responses indicated that they interpreted the employee's postings as such. Therefore, the employee's criticisms were "individual gripes" and not concerted group activity.

### What is the Post's "History"?

A final factor to consider in evaluating whether an employee's social media post justifies discipline is the post's "history" — whether the post was a continuation of a pre-existing conversation between employees or the culmination of an ongoing dispute with the employer, versus a relatively spontaneous post with no recent history behind it.

In several cases where the general counsel found an employee's social media post to be protected, the Facebook post was part of a larger, ongoing dispute or conversation. For example, in the case involving the luxury car salesman who complained about his employer's sales event, the general counsel found that the salesman was "continuing the course of



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concerted activity” that had begun earlier when several salespeople raised their concerns during a staff meeting about the refreshments being served. Similarly, in the case where restaurant employees complained about their employer’s tax withholding practices, at least one employee had already raised the issue with his employer and asked that the matter be addressed at an upcoming employee meeting.

By contrast, the cases where no protected activity occurred often involved spontaneous musings or isolated complaints. In the case where the bartender was fired after he made a Facebook posting about his employer’s tipping policy, the bartender had never mentioned the tipping policy to management, and there had been no recent discussions with his co-workers about the tipping policy or raises. Likewise, in the case involving the recovery specialist who was fired after posting on Facebook about what was happening on her shift, the general counsel wrote that the employee was not trying to induce group action, nor was her post “an outgrowth of the employees’ collective con-

cerns.” Instead, it was a relatively spontaneous post describing what was happening on her shift.

#### **Has the Employee Lost the Act’s Protections?**

Once it is determined that an employee’s social media post constitutes protected concerted activity, the next determination is whether the employee has displayed behavior so offensive or “opprobrious” as to lose the NLRA’s protection under the board’s precedent. In making this determination, the court applies a four-factor test set forth a 1979 case, *Atlantic Steel Co.* Notably, the four cases described above included “swearing and/or sarcasm,” “name-calling,” use of a “short-hand expletive,” and references to management personnel as an “a[–]hole” and “scumbag.” However, in each case, the general counsel concluded that the employees had not engaged in conduct so offensive as to lose the act’s protection.

The general counsel’s analysis appears to give employees ample latitude for personal expression. In finding that one employee did not lose the act’s protection after call-

ing her supervisor a “scumbag,” the general counsel applied the *Atlantic Steel* framework and cited the following facts: (1) **place of discussion:** “the Facebook postings did not interrupt the work of any employee because they occurred outside the workplace and during nonworking time”; (2) **subject matter of discussion:** “the comments were made during an online employee discussion of supervisory action, which is protected activity”; (3) **nature of the outburst:** “the name-calling was not accompanied by verbal or physical threats,” and “the board has found more egregious name-calling protected”; and (4) **provocation:** “the employee’s Facebook postings were provoked by the supervisor’s unlawful” conduct, which “strongly favored a finding that the conduct was protected.”

Interestingly, the first three factors will typically be present in social media cases where employees post on Facebook or Twitter from their own homes during non-working hours. And, with respect to the nature of an employee’s outburst, the board’s precedent has allowed fairly colorful name-call-

ing to be protected. For example, in a 2010 case called *Plaza Auto Center Inc.*, the board ruled in favor of an employee who was fired for calling the owner of his company a “f---ing crook” and an “a--hole,” also adding that the manager was stupid, not liked, and talked about behind his back. This outburst was not so offensive as to lose the act’s protection.

Therefore, the message to employers seems to be that, in the absence of verbal or physical threats, companies need to develop a thick skin when it comes to tolerating employees’ offensive language in social media posts. This is especially true when the offensive posts are provoked by a supervisor’s arguably unlawful conduct. Employers have slightly more freedom to punish employees who post on Facebook while at work, since their postings could be said to interrupt the work of the employee. But even then, the fact that the post happened at work is just one of several factors to consider in deciding whether an employee has lost the protections of the NLRA.

The facts and themes of

these cases provide some guidance to employers who may be deciding whether to discipline an employee for making an offensive social media post. Before taking any disciplinary action, an employer should consider whether the employee was discussing his working conditions in his social media post (such as his hours and compensation), whether other employees were involved in the discussion and addressing “group complaints,” and whether the post was part of an ongoing discussion or dispute at the company. If these signs are present, an employer should think carefully before disciplining the employee.

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