

Social Media Revisited: When Shared Content Shares Too Much

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It has only been a few months since our first social media article. However, due to the rapidly changing landscape of this area of law we felt that the subject should be revisited. In the May 2011 article we discussed the dilemmas that employers face in light of the lack of clarity in this area of the law. Since our last article, additional legal guidance has emerged as to when it will be permissible to discipline an employee for online posts. This article will address (1) recent cases and the factual circumstances that led to employee discipline for online conduct; and (2) the decision-making process that should be conducted prior to disciplining an employee for online conduct.

Developments in Social Media Law:

Most of the developments in this area of law have come from the National Labor Relations Act (NLRA). The NLRA protects employee rights to unionize, but in addition, it protects an employee's right to discuss the terms and conditions of employment with other employees. The NLRA generally applies to all employers. That is, every employer is subject to NLRB (the regulatory board for the NLRA) enforcement actions, regardless of the unionization of the employees.

The NLRA was partially developed as a means to empower employees to challenge unfair labor practices through the developments of unions, the power to strike, and the ability to discuss the terms and conditions of employment with an attempt to initiate group action. Our focus today is how far the NLRA's protections expand in the realm of social media. In other words, when does an employee's online conduct fall under the umbrella of the NLRA's protection? We will first look at cases where the Board found that the employee was wrongly disciplined for his/her online conduct followed by a discussion of cases where it was found that discipline was proper.

You Can't Fire Me for That!

- Online Work-Related Comment Seeking Input From Other Employees

The first case involves a nonprofit that provides social services to low-income individuals. Two of the employees of the nonprofit were involved in a dispute or disagreement. In response to this dispute/disagreement, both employees were scheduled to meet with the executive director of the organization. Prior to the meeting, one of the employees posted on her Facebook page that the organization was not doing enough to assist clients and specifically targeted the other employee. Other employees commented with support and criticisms of workloads and staffing. The employer terminated all five employees that participated in the Facebook conversation for "cyber-bullying."

The Board found that this was a violation of the employees' protected rights under the NLRA because the initial post was made in preparation for the meeting with the executive director and the comments were directly related to criticisms of job performance and workload issues. It was also noted that the occasional swear word or sarcastic comment did not override the protected activity.

- Online Comment Sarcastically Portraying Employer After Concern Was Raised and Ignored in a Staff Meeting

The next case involves a commissioned-employee at a car dealership that was holding a promotional event for customers. The event featured free hot dogs and water in an attempt to bring customers to the dealership. An employee criticized this event in a staff meeting stating that it would negatively affect sales because of the financial stature of the clientele and the quality of food the dealership was offering. After the event, the salesperson posted pictures to his/her Facebook page of the event, in addition to posting pictures of a car accident that occurred on a test-drive a few weeks earlier. The employee was terminated. A few months after the termination, the dealership claimed for the first time that the termination was because of the car accident photos.

The Board found that the dealership violated the salesperson's NLRA rights because the promotional event directly affected the salesperson's commission and the concerns had been previously raised in a staff meeting. The Board did not find the dealership's after-the-fact explanation to be persuasive. Although this decision was later overturned on appeal, it is used in this analysis because the Board initially found that this activity would be protected.

- Online Comment Complaining About Employer's Legal Conduct

The next case addresses the unusual situation in which an employee's online comments address issues regarding the employer's legal conduct but imply that the employer is engaged in illegal conduct. In this case, a group of current and former employees discovered that they all owed taxes related to earnings with the employer. One of the former employees posted a rant on her Facebook page about this situation, which included swear words. A current employee "liked" the posting and another employee commented that the employer was "such an a__ hole." Two other employees also responded that they did not owe money on their taxes. Two customers of the employer also joined the conversation. The employees had previously raised concerns regarding taxation and the matter was scheduled on the agenda for the next manager's meeting.

The employer terminated the employee that “liked” the posting and the employee that referred to employer as an “a__ hole.” One of the participants received a letter from the employer’s lawyer stating that legal action would be taken for his/her defamatory comments.

The NLRB found that the employees were wrongfully disciplined because “[a]lthough the activity was not provoked by any unfair labor practice committed by the employer, the nature of the charging parties’ posting was much less offensive than other behavior found protected by the Board.”

I’m Sorry, Based on Your Behavior, We’re Going to Have to Let you Go.

- Inappropriate Comments About the Workplace After Previous Warnings About Online Conduct

This case involves a newspaper that encouraged reporters and other employees to engage in social media. The newspaper did not have a written social media policy. One reporter created a personal twitter page and in his biography linked to the newspaper’s webpage. He then proceeded to tweet (1) “The [Newspaper]’s copy editors are the most witty and creative people in the world. Or at least they think they are,” (2) “What !?!?!? No overnight homicide? WTF? You’re slacking Tucson,” and (3) “Hope everyone’s having a good Homicide Friday, as one Tucson police officer called it.”

After the first post, the reporter was called in and told his behavior was inappropriate and that he should not make public comments regarding the newspaper. The reporter was terminated after the third post. It was found that his termination was not a violation because he was previously warned that his online activity was inappropriate and although his posts mentioned the workplace, they did not discuss the terms and conditions of employment.

- Online Comments That Are Personal Rants About the Workplace

In the next case, a restaurant/bar had an unwritten tip sharing policy, which the employee complained about on Facebook. Specifically, he stated that it “sucked” that the waitresses did not share tips with the bartender, that he did not have a raise in the last five years, and that all the customers were “rednecks” and he “hoped they choked on glass as they drove home drunk.” The bartender did not discuss this post with any other employees. The bartender was terminated a few months after because of the post.

It was found that his termination was proper because the bartender’s conversation did not “grow out” of conversations with other employees. This is despite the fact that he had raised similar concerns in the workplace. Specifically the Board found that the post was made on the bartender’s own

behalf, he did not have this discussion with co-workers, co-workers did not respond to his online posts, and he did not take any further action in an attempt to initiate group action.

- Comments Made for Purely Personal Reasons that Contain Content that is Protected From Disclosure by Law

The next case involves an employee of a mental health facility who posted on Facebook while at work that (1) it was creepy being in a mental institution overnight, and (2) one client was cracking himself up—either laughing at her, with her, or at the client’s own voices. The employee was terminated because the facility was “invested in protecting people [they] serve from stigma” and the employee’s actions were not “recovery oriented.

The Board found that her termination was proper because the conversation was engaged in for the employee’s own personal amusement, touched on confidential client information, and her posts were made during working hours.

- Venting Purely Personal Workplace Frustrations Online

In our final case, a retail store employee complained online about the “tyranny” of one manager and suggested that all the other employees were going to quit because of this terrible manager. Co-workers responded calling the manager various swear-words and offering words of support to the employee. The employee was suspended for the post.

The Board found that the discipline was not a violation because there was no indication of group activity and the employee was merely venting frustrations online. It was further found that the co-workers’ remarks were made in general support of the employee’s frustrations, but not an initiation of group action to change the organization.

When Can You Discipline an Employee for Online Conduct?

Although there is not a definitive answer of when an employee can be terminated or disciplined for online conduct, we do have some guidance of what an employer should look at prior to making that decision. The analysis will include the following inquiries:

1. Is the comment related to the workplace?

If so, is the comment more specifically related to the terms and conditions of employment? For example, discussions of workload, staffing issues, or promotional events that may affect the employee’s rate of pay all are the terms and conditions of employment. However, discussing a client’s confidential information or comments that contain proprietary or other protected information may not be protected.

2. Did other employees join the conversation?

This can be either online or in-person. Comments that seek input or action from other employees may also be protected regardless if other employees respond. To answer this question, you must also look at what the other employees say (i.e., were the comments in agreement or were they “hang-in there” type remarks).

3. Is the comment related to concerns that the employee has previously raised?

If the employee has previously raised the concern in the work place, to a manager, in a staff meeting, or with other employees, then the comment is more likely to be protected. You should also look at whether the concerns have been previously addressed by the organization or whether the employee has been previously warned that his/her online comments are inappropriate.

4. Is the conversation started for purely personal reasons?

This would include items that loosely relate to the workplace (i.e., the mental health facility example), but do not necessarily discuss the terms and conditions of employment. To determine whether a conversation is purely personal, look at the context of the posting, the comments that reply to the posting, and any subsequent comments by the employee. Whether a comment is made for purely personal reasons is not a clear line, but we do have guidance as to what constitutes a personal reason (for example, personal amusement or individualized rants).

Conclusion:

Based on the above, employers should exercise caution prior to disciplining an employee for online conduct when it involves: (1) discussions of workplace issues; (2) discussions of right, such as union activities (this case was discussed in the May 2011 article); (3) posts that mirror concerns that were previously raised with management or at a staff meeting; and (4) posts that are true, but not necessarily unfair labor practices. The use of swear words, other improper comments, or derogatory name-calling do not eliminate an employee’s protection. The Board has drawn a clear line that online comments that are purely personal rants or engaged in for personal amusement are not protected.

Although this area of law still has many questions, the developments that we have seen have added some clarity to what is permissible action for an employer to take in response to employee online conduct. In a developing area of law, there is the opportunity to become the “lesson” that everyone else learns from. As always, if you have an issue that you need help with, we recommend that you seek the advice of legal counsel.