Insights, News & Events

NOT AS BAD AS WE FEARED: NLRB ISSUES GUIDANCE ON SOCIAL MEDIA

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Earlier this year there was deep concern in the employer community because the National Labor Relations Board (NLRB) issued a complaint against an employer who disciplined an employee for highly derogatory comments she made about a supervisor on her Facebook page. Questions about whether an employer had *any* right to respond to such comments without violating the National Labor Relations Act (NLRA) were rampant.

But three recent memos from the NLRB's Office of General Counsel show that little has changed from the pre-Facebook analysis of the concept of "protected concerted activity."

FIRST, SOME CONTEXT

The NLRB analyses referred to are NLRB Advice Memos, which are prepared by the Office of the General Counsel (GC), a division within the NLRB, to respond to requests for advice from various NLRB Regions across the country about the proper response to some specific fact pattern under the Act. In answering these requests, the General Counsel considers the facts of the specific question posed and analyzes Board precedent relating to the situation.

The GC then reaches a conclusion whether the particular fact pattern violates the Act or not. If the fact pattern does not violate the Act, the Office of General Counsel indicates the unfair labor practice charge should be dismissed. If it finds a violation, it will direct the Region to issue a complaint if the matter is not settled in accordance with its analysis of the law.

All this analysis, and the conclusions, are incorporated into a document known as an Advice Memorandum. These Advice Memos are distributed for the information of all NLRB Regions so that they will all have the same guidance and can address similar questions in a coordinated and consistent manner throughout the United States. The Advice Memorandum does not have the same authoritative force as a published decision of the Board, but it does set out the agency's enforcement position on the questions covered and provides guidelines that will be followed by all Regions when faced with a similar situation.

All three Advice Memos were issued in July 2011, analyzing different scenarios in which employees had been disciplined for various postings on social media. In all three cases, the employers' discipline or termination decisions were found *not to violate* the NLRA.

JT'S PORCH SALOON & EATERY

The first Memo considered whether a restaurant employer in Illinois violated the Act by terminating a bartender for his Facebook complaints that he had not received a raise in five years and that he was required to do waitress work without tips. These comments were written in response to a stepsister's question about how his night went. Several days later, the employer, taking a cue from the fighting-fire-with-fire playbook, sent the discontented bartender a Facebook message telling him he was fired.

The Office of General Counsel concluded there was no violation of the Act because there was no evidence the bartender had engaged in "concerted" activity. The bartender did not discuss his posting with any other employees and no coworkers responded to his posting. There was no attempt to encourage group action on the tipping policy or wage increases. The bartender's complaint was purely individual; and, since it did not involve group action, his termination did not violate the Act.

Here is the General Counsel's summation of the reasoning used to analyze the terminated employee's posting. This identical analysis was relied on in two of the three Advice Memos referred to in this article and is obviously central to the process the NLRB uses to decide whether employee social media postings are protected or not:

> **The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The question is a factual**

one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]" Thus individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are considered concerted. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention.

WAL-MART

The second Advice Memo involved an unhappy customer service employee of one of the retail giant's stores in Oklahoma. Most of this employee's rants against the employer generally and against an assistant manager specifically, unlike the bartender's, were directed to Facebook friends who were primarily coworkers. And several coworkers responded to his rants.

Management received a copy of the postings and disciplined the employee for "putting some real bad things on Facebook about Wal-Mart and [the assistant manager.]" The employee was told that he would be terminated if his behavior continued and was required to take a one day "decision day," which was paid but precluded eligibility for a promotion for 12 months.

The Office of General Counsel concluded that this charge should be dismissed because the customer service employee's complaints were primarily the product of his own individual grievance rather than a call to concerted action. "[C]omments made 'solely by and on behalf of the employee himself' are not concerted. Comments must look toward group action; 'mere griping' is not protected."

MARTIN HOUSE

The third fact pattern involved a non-profit residential facility for homeless individuals. The employee, a recovery specialist, put comments on her Facebook

wall while she was working a night shift. These comments included negative references about the facility's clientele. Neither of the individuals she was communicating with that night were coworkers and she admitted that she was not Facebook friends with any of her coworkers. Unfortunately for the employee, she was Facebook friends with a former client of the facility who saw the comments on her Facebook page and complained to the employer about the specialist's negative observations.

The recovery specialist was terminated. In the termination notice the employer quoted her late-night comments about the employer's clients and went on to state, "[w]e are invested in protecting people we serve from stigma" and it was not "recovery oriented" to use the clients' illnesses for her personal amusement.

The General Counsel, after restating the paragraph quoted earlier on the test for concerted activity, concluded that there was no evidence of protected concerted activity. The employee did not discuss her Facebook posts with fellow employees and none of them responded to her posts. Nor was she attempting to induce or prepare for group action and her activity was not an outgrowth of group concerns. The employee was just communicating with her personal friends about what was happening on her shift. Her comments were not protected and hence her termination did not violate the Act.

WHAT CAN WE LEARN?

The lesson to be taken from these Advice Memos is that disciplining employees for comments they make in social media is neither prohibited, nor is it without risk. Any decision to discipline or terminate employees for social media postings should be carefully weighed and reviewed with your labor counsel before implementation. It should be some comfort to know that, based on a careful reading of the most recent Advice Memos, the rules for determining when activity is protected have not changed. Purely individual gripes aired through social media are no more protected now than they were before Facebook became the rage.

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