

## EMPLOYEE FIRED FOR FACEBOOK RANT DOESN'T LIKE STATUS

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There's no doubt about it – Facebook is the 21<sup>st</sup> Century water cooler. Workers who used to gather in the break room to talk about the latest sports news, the newest outrageous celebrity scandal, or the latest office gossip are now sharing this communication online. In some cases that's none of your business as an employer. But what if the ranting is about you? Or your workplace?

Such statements are out there in cyberspace for everyone to see for as long as they remain posted. A recent Oregon case highlights a typical scenario employers are now having to grapple with on a daily basis, and provides a good lesson for employers.

### I CAN'T TAKE IT ANY MORE

Jennifer Shepard was a child-protective-services caseworker for Oregon's Department of Human Services (DHS). As you can imagine from her job title, Ms. Shepard was exposed to many unfortunate and downright depressing situations as part of her work, and after years in the job, she found herself jaded and frustrated with her work. Time and time again, she saw people on public assistance taking advantage of the system and living above their means, and was obviously also exposed to heartbreaking examples of child abuse.

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Rather than simply vent her frustrations to friends, family and coworkers over dinner or drinks, she took to her Facebook page. In a series of posts and comments, she railed about the injustice of seeing people on welfare with “gigantic flat screen TVs” and driving BMWs. She created her own set of rules for society if she were in charge (which I’m sure we’ve all done at some point) which included: “If you are on public assistance, you may not have additional children and must be on reliable birth control,” and “If you physically abuse your child, someone should physically abuse you.”

Many, perhaps most, people would agree with these sentiments, but the problem for Ms. Shepard is that her comments compromised her ability to do her job effectively. Her managers became aware of her Facebook rants and realized that they would never be able to call her as a witness in a case again, as opposing parties would find these statements online and be able to contend that she was biased and judgmental. After an investigation into the comments, DHS terminated her employment and she countered with a lawsuit, claiming that the state violated her First Amendment rights.

In a November 2013 decision, the federal court hearing the case dismissed Ms. Shepard’s claim and upheld the termination. The court ruled that, although Ms. Shepard had additional rights beyond that of a private-sector employee, the state still had a valid justification for her termination that trumped her free speech rights. This case may be appealed to the federal court of appeals, so the battle may not yet be over.

## **PUT YOURSELF IN THIS PICTURE**

While private employers aren’t subject to First Amendment claims, there are still landmines to be found when it comes to the ever-growing world of Facebook firings. Employees have a variety of legal options when it comes to challenging terminations based on things that they saw online about their work or workplace. First and foremost, the National Labor Relations Board has become particularly interested in standing up for the rights of Facebook-ranters, contending that any online speech that is about the terms and conditions of employment is tantamount to “protected concerted activity.”

Just as you cannot instruct your employees not to band together in order to potentially form a union or lodge a complaint, the NLRB wishes that these protections would broadly cover online chatter – including rantings about new supervisors, pay practices, low Christmas bonuses, poor working conditions, difficult customers, etc.

Second, employees who have their Facebook privacy settings cranked up to high may contend that the statements are none of the employer's business, and that any attempt to gather information about what they have said online is an invasion of privacy worthy of a lawsuit.

Third, as illustrated by a recent New Jersey case filed by a paramedic who was fired after complaining on Facebook about other paramedics who she believed failed to do their jobs competently, the very act of obtaining the evidence may get you into trouble. The employee sued under the Stored Communications Act, a federal law that protects the privacy rights of individuals in electronic stored communications. The court ruled that, while the law did apply to Facebook content, the employer did not violate the Act in this instance, because one of the worker's "friends" voluntarily provided the information to the employer. But if the employer had improperly accessed the information, or had pressured a coworker into revealing her private posts, it would have broken the law.

## **OUR ADVICE**

Tread cautiously when disciplining an employee for a Facebook post. Take some time to determine whether the statements may be considered concerted activity that would be protected under federal law, and make sure not to overstep your bounds when obtaining evidence. More importantly, take a step back and determine whether you even want to make a big deal about the online comments. You know that your workers are probably venting about the workplace or their supervisor at the corner bar or with the friends and neighbors, and yet you don't investigate these statements. There's not much difference between these statements and Facebook comments.

Remember that your workers' Facebook world is rather limited in scope, and many of the people reading the comments include the worker's Aunt Tilly and high school friends who have no connection to your company. Further,

because Facebook firings are still a rather novel concept, they attract media attention and online scrutiny to a much greater degree than other terminations. Consider whether you want your company to be on the news as the latest Facebook-firer before you drop the hammer.

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