



Legal INSIGHTS

with Jeffrey W. Larroca

Facing Facebook in the Office



Imagine one of your employees stands up in the lobby of your business to speak to a co-worker. Let's call it a bank. A dozen customers are present, waiting in line for teller service. The employee is agitated and loud. In a clear and unmistakable tone, overheard by all, he says, "This job stinks. The pay stinks, the hours stink and" he pauses, pointing theatrically for effect and pointing at you, "the manager stinks!"

There is little question that the employee in question would be disciplined and in all likelihood, fired.

However, let's assume that same employee comes home from work and posts on his Facebook wall the exact same sentiments. The observations go to all 473 of his friends and, due to his settings, their friends, so the reach of the message is far broader. Some of those friends work at the bank. They "like" his comments. Discussion ensues.

Can the employee be disciplined or terminated?

Not without possibly running afoul of national labor relations laws. Indeed, the Office of the General Counsel of the National Labor Relations Board (NLRB) just published updated guidance for employers who are dealing with employees and their use of social media. Some snippets from the report - which analyzes several NLRB decisions - illuminate NLRB's thinking:

The Employer is a collections agency. The Charging Party worked in the inbound calls group at one of the Employer's call centers. Charging Party worked in the inbound calls group for approximately seven years. She asserted that she was the second best performing employee in the group based on the volume of payments received, and thus that she earned a significant portion of compensation in bonuses. On October 7, 2010, the Charging Party's supervisors informed her that due to low call volume in the inbound calls group, she was being moved to one of the outbound calls groups. The following day, the Charging Party approached her supervisor and expressed her frustration with the transfer decision, arguing that given her high performance level, it did not make sense to transfer her.

Okay, so far so good. The employee is upset and talks to her supervisor. But then:

After arriving home, the Charging Party

posted a status update on her Facebook page. Using expletives, she stated the Employer had messed up and that she was done with being a good employee. The Charging Party was Facebook "friends" with approximately 10 co-workers, including her direct supervisor. . . employees also posted, with one of them commenting that only bad behavior gets rewarded, and that honesty, integrity, and commitment are a foreign language to them. This co-worker also wrote that the Employer would rather pay the \$9 an hour people and get rid of higher paid, smarter people. The Charging Party responded and indicated that the Employer could keep the \$9 an hour people who would get the Employer sued. Another former employee called for a class action, stating that there were enough smart people to get them sued.

Needless to say, the offending party returned to work and was fired.

The NLRB, however, determined that the firing violated federal law because a rule against abusive or obscene Facebook posting directed at supervisors "would reasonably tend to chill employees" in the exercise of their labor rights. Because "[t]he Charging Party here initiated the Facebook discussion because the employer transferred her to a less lucrative position," the NLRB concluded that the postings "involved complaints about working conditions and the employer's treatment of its employees" and thus, the firing was unlawful. More important to the NLRB, co-workers and former co-workers responded. Some of the comments echoed the Charging Party's frustrations with the employer's treatment of employees, and one former co-worker suggested taking concerted activity through the filing of a class-action lawsuit.

So, where does that leave employers? Can an employee go on Facebook, or even into a supervisor's office, and write/utter profanity in objecting to work decisions?

The answer is nothing short of a morass, because in the same guidance, the NLRB concluded that firing another employee for other Facebook comments (the employee used her cell phone during her lunch break to update her Facebook status with a comment that consisted of an expletive and the name of the employer's store and 30 minutes later, posted again, this time commenting that the employer did not appreciate its employees)

was proper. The NLRB determined that such observations, even after what the employee deemed to be unfair treatment, were "merely an expression of an individual gripe." Why?:

The Charging Party's first status update was because she was frustrated about an interaction she had had with her supervisor. The Charging Party had no particular audience in mind when she made that post, the post contained no language suggesting that she sought to initiate or induce co-workers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her co-workers. Moreover, there is no evidence that she was seeking to induce or prepare for group action or to solicit group support for her individual complaint. Although one of her co-workers offered her sympathy and indicated some general dissatisfaction with her job, she did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party.

So, if you use expletives about the work decisions of your supervisor on Facebook and it engenders a discussion about work conditions from co-workers, then you cannot be fired. Conversely, if you use expletives about your employer and your co-workers only "like" your comments, or offer sympathy, then you can be fired.

What this means, of course, is that the conduct becomes secondary to the effect, and that an employer will have to engage in a costly, time-consuming investigation to determine just how the expletives were received. What that essentially means is that employers will shy away from disciplining employees for most anything said on Facebook because it is "just not worth the aggravation and potential liability."

Welcome to the future of social media!

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