



# Social Media for Employers: Recent Cases Before Courts, NLRB

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Social media continues to be in the news. The NLRB issued an “updated” summary of social media cases earlier this year and social media continues to find its way into court decisions.

In 2011, the NLRB’s General Counsel issued a summary of 14 social media cases handled by that office. On January 24, 2012, the General Counsel issued an updated summary covering another 14 cases. The General Counsel’s position in these cases is that social media policies (or any other policies) that may “reasonably chill” employees in the exercise of their rights under the National Labor Relations Act (“Act”) are unlawful. Here are the high points from the updated summary:

- The General Counsel continues to find employer policies and work rules to be unlawfully broad when employees may reasonably view them as prohibiting conduct protected under the Act. For example, work rules or policies prohibiting “insubordination or other disrespectful conduct” and “inappropriate conversation” were held to be unlawfully broad because employees might think that they cannot join together to complain about their terms and conditions of employment, which is protected activity under the Act.
  - Importantly, the General Counsel’s Office rejected a “savings clause” in a social media policy designed to prevent the policy from being overly broad. The employer’s social media policy stated that “it would not be interpreted or applied so as to interfere with” employee rights under the Act. The General Counsel found this language did not “save” the policy from being overbroad
- because an employee could not reasonably be expected to know that the clause would apply to discussions the employer deems inappropriate under the policy. In light of the General Counsel’s approach, employers should narrowly tailor their social media policies rather than attempt to use “savings” language to fix overly broad policies.
- On the other hand, the General Counsel found an employer’s “amended” social media policy to be lawful because it prohibited conduct that was “vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.” The General Counsel found the policy lawful because employees would not reasonably construe the policy’s language to prohibit conduct protected by the Act.
  - Individual gripes by employees are not protected activity. Thus, the General Counsel found in several cases that employers did not violate the Act by discharging employees who complained about their employment on social media pages because they were acting solely on their own behalf rather than on behalf of themselves and other employees.
  - Employees can go overboard in their criticisms, however, and lose the protection of the Act. Language that is “opprobrious,” or sufficiently “disloyal, reckless, or maliciously untrue” may remove the activity from protection, depending upon the circumstances.

In addition to the NLRB's attention to employee activity, courts and arbitrators are increasingly addressing social media. Here are just a few recent examples:

- A federal district court in Illinois ruled that an employee, a marketing director for an interior design firm, could proceed with federal Stored Communications Act and Lanham Act claims against her employer based on her co-workers' unauthorized use of her Facebook and Twitter accounts to promote the employer. *Maremont v. Susan Fredman Design Grp.*, No. 10C 7811 (N.D. Ill. Dec. 7, 2011).
- A federal court in Washington ruled that a trial was necessary to determine whether an employee, who had been on leave for treatment of depression, was unlawfully discharged due to her suicidal comments made via social media. *Peer v. F5 Networks, Inc.*, No. C11-0879-JCC (March 19, 2012).
- An arbitrator denied a grievance challenging the discharge of a Head Start teacher who started a closed Facebook page to "gripe" about employees, parents, and students at the Head Start program. Although the members of the invite-only group complained about work, they were also exceedingly profane, many of the posts were not connected to working conditions, and, most importantly, there was "nothing about the conversations that would lead to the conclusion that [the employees] were seeking to band together to take action to address their workplace concerns." *Vista Neuvas Head Start*, 129 LA 1519 (VanDagens, 2011).
- A federal court in California held that a mobile news website company sufficiently stated claims for negligent and intentional interference with prospective economic advantage by alleging that a former employee appropriated a company Twitter account that drove traffic to its website. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ (N.D. Cal. Jan. 30, 2012).
- An NLRB administrative law judge recently ruled that a "Jimmy John's" franchisee violated the Act when an assistant manager posted the telephone number of a known union supporter on an anti-union Facebook page and encouraged others to "text" him to let him know "how they feel." The ALJ believed this post amounted to an invitation for other anti-union co-workers to harass the employee in retaliation for this union activity. *Jimmy John's*, 18-CA-19707 (April 20, 2012).

Employers must act carefully when issuing disciplinary action in connection with social media activity. Seeking legal advice is important because, as shown above, employee social media activity implicates numerous areas of employment law.