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Can Your Employer Fire You For Facebook and Twitter Posts? – Maybe

November 22nd, 2011 by jliace

Can your employer file you for Facebook and Twitter post? Section 7 of the National Labor Relations Act (NLRA) gives employees the right to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection. This right includes communicating with other employees regarding terms and conditions of employment. When the NLRA was enacted in 1935 social media sites such as Facebook and Twitter were unthinkable. However, in today's internet-driven world, the National Labor Relations Board (NLRB) has recognized the need to address how these new avenues of communication affect labor and employment law.

On August 18, 2011, The NLRB's Office of the General Counsel issued a report concerning how federal labor law will adapt to the widespread growth of social media websites like Facebook and Twitter. The report highlights a number of recent decisions involving employees who were either disciplined or terminated from work for comments they posted on these sites. While the Board has not gone so far as to let employees say anything, it has ruled that some Facebook and Twitter comments are protected under Section 7 of the Act.

In one case, the Board found that an employer unlawfully discharged five employees who posted comments on Facebook complaining about another employee who accused them of poor job performance. In that case, the employee, responding to criticism from a co-worker, posted on her personal Facebook page "A co-worker feels that we don't help our clients enough. I about had it! My fellow co-workers how do u feel?" Four other employees then commented on this post, expressing their dissatisfaction with their co-worker. The next day, all five were terminated for their comments. The Board concluded that the discharges were unlawful because the employees' postings were protected concerted activity.

The Board said activity is concerted when an employee acts with or on the authority of other employees, and not solely by and on behalf of himself. Here, the Board found that the Facebook discussion was a textbook example of concerted activity because it was an appeal by one employee to her co-workers for assistance. Furthermore, the

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Facebook postings were protected activity because they implicated working conditions. The Board said protected activity does not change simply because the statements were communicated over the Internet. The Board held that because the Facebook postings directly implicated terms and conditions of employment and were, the conversation was concerted activity for mutual aid and protection under Section 7.

In another case, the Board considered whether an employer maintained an unlawful internet and blogging policy and unlawfully terminated an employee for posting negative remarks about her supervisor on her Facebook page. There, the Board recognized the well-established protection for employee protests of supervisors, and found that the employee did not lose that protection based on the place of the discussion. Next, the Board considered the employer's internet policy, which prohibited employees from making disparaging remarks when discussing the company or supervisors, and found this portion of the policy to be unlawful because it was too broad and could potentially limit protected Section 7 activity.

The Board, however, refused to extend protection to Facebook and Twitter posts in other cases where the comments did not rise to the level of protected concerted activity. In these cases, the Board considered the subject matter of the comment – was it regarding working conditions or terms of employment; the parties involved in the discussion – was it a discussion amongst multiple employees or just one single employee griping; and e substance of the comment – was is vulgar, threatening or harassing toward other employees or Individuals? In these cases, the Board held that Facebook and Twitter posts were not protected concerted activity where the comments did not concern terms or conditions of employment, where the comments were those of a single employee and not "concerted" activity, and where the comments were merely offensive remarks toward other individuals.

So what should we take from these recent developments? First, we now know that employees' conversations complaining about supervisors or working conditions is protected concerted activity regardless of whether it occurs on Facebook, at the water cooler, or in the factory parking lot. Next, we can see that some employers will need to change their internet policies if those policies are overly broad or potentially prohibit Section 7 activity. Finally, employees must still be careful about what they say on the internet. While certain comments and conversations will be protected, employees must still be careful because they could face discipline from their employers for comments that fall outside the scope of Section 7 protected concerted activity.