

By Robert J. Baror

Releasing an employee for disparaging a supervisor online may land the company in hot water if the disparagement has to do with the workplace.

# The NLRB and Social Media

Would you imagine that employees could call their bosses “scumbags” and “d--ks” on Facebook and that their employers could not legally fire them? That is the case, at least in certain circumstances, under the National Labor

Relations Act (NLRA). *See Am. Med. Response*, Case No. 34-CA-12576 (Advice Mem. Oct. 5, 2010). Many attorneys representing nonunionized entities may think of the NLRA and the National Labor Relations Board (NLRB) as largely irrelevant to their clients. However, the specific section of the NLRA that protects workers’ rights to tell a coworker on Facebook to “come do mt [my] f---ing job n c if I don’t do enough,” section 7, applies to most private businesses with an annual inflow or outflow of over \$50,000. 29 C.F.R. §104.204. Of particular importance to all private enterprises, in 2010 and 2011 a spate of NLRB Office of the General Counsel advice memoranda and NLRB administrative law judges’ opinions addressed section 7 and social media. These have generally granted employees expansive rights to criticize their employers and supervisors in social media forums such as Facebook, Twitter, and blogs under the theory that intemperate outbursts can constitute “concerted activity for the pur-

pose of... mutual aid or protection [of employees].”

NLRB administrative law judges have found that individual posts on Facebook that elicit responses from coworkers fit the “concerted activity” category because “[t]he lone act of a single employee [such as posting on Facebook] is concerted if it ‘stems from’ or ‘logically grew’ out of prior concerted activity.” *Karl Knauz Motors*, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011). In *Karl Knauz*, involving sarcastic and mocking Facebook posts by an employee about an employer’s food options at a promotional event, the “prior concerted activity” consisted of complaints that using a hot dog stand was not classy enough. Nonetheless, despite the NLRB activism on social media issues, the NLRA does not automatically inoculate all employees maligning their employers. From the Office of the General Counsel advice memoranda it does appear that the NLRA will not protect a Facebook post that does not draw responses from coworkers, regardless of the post’s relevance to the workplace, if it is not explicitly a call to action. *See JT’s Porch Saloon & Eatery, Ltd.*, Case No. 13-CA-46689 (Advice Mem. July 7, 2011). Therefore, ascertaining whether the NLRA protects social media comments



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depends on discerning (1) if an employee's actions constitute "concerted activity" with other employees, or (2) if an employee acted with the object of initiating or inducing group action. If an employee's action does not fall into one of these two categories and qualifies merely as individual griping through which the employee did not intend to instigate "concerted action," then an employer still has the right to terminate the employee. Distinguishing between "concerted activity" and an individual musing simply for the purpose of complaining is not necessarily easy since one person may view a comment as an employee's solitary complaint on Facebook while the NLRB Office of the General Counsel may view it as "concerted activity" or a call to "concerted activity." However, the recent raft of cases and advice memoranda provide some guidance on how to proceed. This article will explore the meaning of these recent decisions and memoranda and try to explain how defense attorneys can help their clients to navigate their way through the thicket that the NLRB has created.

### And the Old Shall Become New Again

Congress passed the NLRA in 1935 in the midst of the "Second New Deal" at the same time that it enacted the Social Security Act and other important socioeconomic legislation. It came into being in a world where the telephone was a luxury item and the fastest communications provider was often the U.S. Postal Service. Needless to say, when employees gained the right to engage in "concerted activity" in 1935 their audience was largely confined to coworkers, family, and actual friends unless they could garner interest from newspapers or radio. From that world we have derived the principles applied today to employees' use of Facebook, which claims more than 800 million active users. Section 8(a)(1) of the NLRA makes it an unfair labor practice to interfere with, restrain, or coerce employees to exercise the rights guaranteed in section 7. Section 7 specifies that "employees shall have the right to... engage in... concerted activities for the purpose of collective bargaining or other mutual aid or protection." Since social media cases by and large have nothing to do with collective bargaining, aggrieved employees often invoke the "other mutual

aid or protection" aspect of section 7. Just what "concerted activities" means in section 7 is at the heart of social media cases. Interestingly, we can trace the idea that a Facebook posting by a solitary individual in his or her basement to a passive audience of coworkers online constitutes protected activity to a 1951 NLRB decision, *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951). In *Root-Carlin*, an individual employee was fired because he attempted to organize a labor union at his employer's plant. What made this case different from previous union organizing cases was that the discharged employee, Vincent Loretto, was not working "under the auspices" of a labor organization but was merely acting on his own to encourage employees to band together. Even without evidence that any employees took up his call to action and joined him in "concerted activity," which the employer argued, meant that section 7 did not protect Loretto's actions, the NLRB found that "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." *Id.* at 1314 (emphasis added). And thus, from this 1951 decision, the principle that the NLRB took up in the 2010 and 2011 social media cases was born: the "concerted activity" prong of section 7 can protect one person making an individualized statement so long as his or her conduct "seek[s] to initiate or to induce or to prepare for group action." See *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986) (referencing *Root-Carlin*, 92 N.L.R.B. 1313 (1951)).

### Facebook as the New Coffee Break Chatter

The NLRB has based recent social media decisions on the idea that a posting on Facebook is no different than an intimate discussion among coworkers occurring semi-privately. This is perhaps most clear in *Hispanics United of Buffalo, Inc.*, a case having to do with Facebook postings aimed at a coworker. Case No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011) (unpaginated). In *Hispanics United* the administrative law judge found that "[e]mployees have a protected right to discuss matters affecting their employment amongst themselves." However, the lan-

guage used by the administrative law judge does not seem to fit the actions of the employees, who posted comments on Facebook that many people beyond coworkers could have seen, meaning the dialogue reached much farther than just "amongst [employees] themselves." The employee whose complaints about coworkers generated the brouhaha in *Hispanics United*, Lydia Cruz-

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Moore, was a domestic violence victim's advocate. Cruz-Moore criticized the job performance of other Hispanics United employees and communicated this in text messages to a coworker, Mariana Cole-Rivera. In one text message Cruz-Moore informed Cole-Rivera that she planned to raise her concerns with the agency's executive director. This apparently was too much for Cole-Rivera to stomach, and she felt compelled to unburden her frustration with Cruz-Moore on Facebook. Accordingly, Cole-Rivera wrote, "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?" Cole-Rivera's post then spurred a burst of commentary from coworkers hostile to Cruz-Moore. These coworkers wrote the following: "(i) What the f... Try doing my job I have 5 programs; (ii) What the Hell, we don't have a life as is, What else can we do??; (iii) Tell her to come do mt [my] job n c if I don't do enough, this is just dum. [sic]" The commentary continued, but the above gives the flavor of what the employees wrote. Not surprisingly, Cruz-Moore, the target of this arguable abuse, complained about it to

the agency's executive director who fired five of the employees involved in the Facebook postings. At this point the NLRB apparatus sprang into action. Ultimately, this case came before Administrative Law Judge Arthur I. Amchan who found that the terminations violated section 8(a)(1).

Judge Amchan's opinion, as stated before, found that "[e]mployees have a protected right to discuss matters affecting their employment amongst themselves." He believed that section 7 protected the conduct in this case. However, it does not necessarily make sense to treat a "conversation" on social media in the same manner that we would treat a conversation among coworkers on their coffee breaks. Unlike social media, an in-person discussion reaches a limited audience. Outlets such as Facebook and Twitter, however, can reach thousands of people, and most of them probably will not work together. Negative comments about an employer disseminated through Facebook or Twitter can seriously injure an employer's business. Nonetheless, Judge Amchan found that "[t]he [terminated employees] herein were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." As the Arab Spring has shown us, social media can become a potent organizing tool, and if employees use it for this purpose, it likely would and should enjoy section 7 protection. However, many Facebook postings or Tweets, even if they elicit responses, function as nothing more than individualistic catharsis. Characterizing them as the "a first step towards taking group action," as the administrative law judge in *Hispanics United* did, seems inapt.

### "Facebook Discussions" vs. Solitary Posts

Two social media cases in particular that led the Office of the General Counsel to issue advice memoranda show the dichotomy between allowable and forbidden employee behavior under section 7 of the NLRA when it comes to social media: *Am. Med. Response*, Case No. 34-CA-12576 (Advice Mem. Oct. 5, 2010), and *JT's Porch Saloon*, Case No. 13-CA-46689 (Advice Mem. July 7, 2010). As to Facebook postings, the Office of the General Counsel has differentiated sharply between

postings that elicit responses from coworkers and those that do not.

In *Am. Med. Response*, the Office of the General Counsel found that the NLRA protected an employee when she called her supervisor a "d--k" and a "scumbag" because she was "discussing supervisory actions with coworkers in her Facebook post." Case No. 13-CA-46689, at 9. Presumably, "discussing" meant virtual interactions, such as an interaction with one coworker who responded to Souza's post with "Ohhh, he's [the supervisor] back" and "[c]hin up," and an interaction with a former coworker who wrote, "I'm so glad I left there." *Id.* at 3-4. But none of the posts referenced in the advice memorandum indicate that the employee ever wrote about the substance of her disagreement with management, which was that she was not allowed to have a union representative present after she was asked to fill out an incident report.

In *JT's Porch Saloon*, a bartender had a conversation on Facebook with his step-sister during which he voiced "complaints that he hadn't had a raise in five years and that he was doing the waitresses' work without tips." *JT's Porch Saloon*, Case No. 13-CA-46689, at 1. The employer terminated the bartender for voicing these complaints publicly, but the Office of the General Counsel found that the termination did not violate of section 8(a)(1) of the NLRA because "[t]he Charging Party did not discuss his Facebook posting with any employees either before or after he wrote it. In addition, none of his fellow employees responded to it." *Id.* at 3. It is worth noting that the bartender also made derogatory comments about his employer's customers, and his employer offered this as the reason for terminating the bartender. However, the advice memo analysis does not hone in on this. The advice memorandum reasoned that the employer did not violate section 8(a)(1) because coworkers did not respond to the bartender's posts, and the bartender did not discuss the Facebook posts with coworkers before or after he made them. Unfortunately, the Office of the General Counsel did not take advantage of *JT's Saloon* to articulate a rule that disparaging an employer's customers provides independent grounds for termination that would not violate section 7, which employers and employees would have found help-

ful, even though the *JT's Saloon* advice memorandum seems to reason as much.

### Moving Toward a More Balanced Approach?

Reading the *Am. Med. Response* and *JT's Saloon* advice memoranda it appears at first that the NLRB differentiates between workplace complaints on social media that elicit a response from coworkers and those that do not. However, the advice memorandum issued in *Wal-Mart*, complicates that initial impression. Case No. 17-CA-25030 (Advice Mem. July 19, 2011). In *Wal-Mart* an employee posted on his Facebook page "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit." *Id.* at 1. The Office of the General Counsel found that "[t]he Charging Party limited his observations to his Facebook friends, which were largely composed of coworkers." *Id.* Two coworkers went ahead and responded to the charging party's posts writing, (1) "bahaha like :)," and (2) "What the hell happens after four that gets u so wound up??? Lol." *Id.* at 1-2. Responding to these comments, the charging party wrote,

You have no clue [Employee 1]... [Assistant Manager] is being a super mega p--a! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price...that's false advertisement if you don't sell it for that price... I'm talking to [Store Manager] about this cuz if it don't change walmart can kiss my royal white ass!

*Id.* at 2.

Supposedly then two other coworkers made supportive comments, including "a 'hang in there' type of remark." *Id.* at 2. Not surprisingly, when the store manager found out about these postings, he fired the charging party.

The *Wal-Mart* case did bear some similarity to the *Am. Med. Response* case in some respects. An employee complained about a supervisor using objectionable language but clearly discussed the workplace, and coworkers responded. However, the Office of the General Counsel reacted significantly differently to the charging party's actions in the *Wal-Mart* case than it did in the *Am. Med. Response* case. The *Wal-Mart* advice memorandum stated this:



Here we conclude that the Charging Party's Facebook postings were an expression of an individual gripe. They contain no language suggesting the Charging Party sought to initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced sale items. Moreover, none of the coworkers' Facebook responses indicate that they otherwise interpreted the Charging Party's postings. Employee 1 merely indicated that he found Charging Party's first Facebook posting humorous, while Employee 2 asked why the Charging Party was so 'wound up.' Another coworker's 'hang in there'-type comment suggests that she only viewed his postings to be a plea for emotional support. Nor is there evidence that establishes that the Charging Party's postings were the logical outgrowth of prior group action.

*Wal-Mart*, Case No. 17-CA-25030, at 3.

This analysis makes sense, except that it also would have made sense in the *Am. Med. Response* case, but the Office of the General Counsel did not apply it there. In the *Am. Med. Response* case, the employee merely took to name-calling without even addressing the substance of her complaint, whereas at least in the *Wal-Mart* case the employee indicated the factual basis for his complaint. Perhaps the NLRB position has evolved over time from October 2010 when the Office of the General Counsel issued the *Am. Med. Response* advice memorandum to July 2011 when the office issued the *Wal-Mart* advice memorandum.

While what kind of discussion among coworkers will trigger section 7 protection remains unclear, at least it appears that if coworkers don't discuss the workplace and no one issues a specific "call to arms," then the NLRB won't consider a discussion section 7 protected activity. This offers defense attorneys something to work with. However, when coworkers do have some back and forth discussion, an attorney will need to analyze a case reviewing all the facts intensively.

### Even on Social Media There Are Limits

In *Am. Med. Response*, the Office of the General Counsel found that "the conduct [the "scumbag" and "d--k" comments] was not

*so opprobrious* as to lose the protection of the Act." *Am. Med. Response*, Case No. 13-CA-46689, at 9 (emphasis added). The four-factor test set forth in *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979), for determining when conduct crosses the line so that it would lose NLRA protection involves weighing (1) the place of a discussion; (2) the subject matter of the discussion; (3) the nature of an employee's outburst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice. The social media cases reviewed by this author have not deeply explored how social media conduct would lose protection under the *Atlantic Steel Co.* test. However, ample case law and administrative rulings have considered protected versus unprotected activity in contexts other than social media. This authority suggests that the NLRA protects a fairly broad array of conduct. Once the NLRB finds that an employee engaged in "concerted activity," section 7 will rather easily protect that employee.

The NLRB, rather than merely focusing on the conduct's offensiveness, does weigh each fact of the four-factor test articulated in *Atlantic Steel Co.* It appears that the board will tolerate even extremely rude and insulting statements if an employee makes them away from a main workplace while engaging in concerted activity and in response to some sort of employer conduct that threatens to violate the NLRA. For example, in *Stanford New York, LLC*, because a conversation occurred away from the normal working area, the employee's outburst expressed wanting to join a union, and a termination threat triggered the employee's angry comments, the NLRB found that the NLRA protected the employee's loudly calling a supervisor a "liar" and a "f--ing son of a bitch." 344 N.L.R.B. 558-59 (2005).

However, section 7 will not protect all conduct. In *Media General Operations, Inc. v. NLRB*, the Fourth Circuit found that when an employee told a supervisor that the employer's vice president was a "f--ing idiot," section 7 did not protect the employee because legal activity that an executive at the company undertook provoked the employee's comment rather than an employer action that violated the NLRA. 560 F.3d 181 (4th Cir. 2009). Specifically, the vice president had sent letters to someone describing management's perspective on labor negoti-

ations, which upset the employee eliciting the employee's offensive comments.

When counseling clients on whether they may terminate employees who have used offensive language about supervisors using social media, *Am. Med. Response* provides an excellent roadmap about the problems associated with the four-factor test of *Atlantic Steel Co.* The first factor, the place of discus-

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sion, generally will favor an employee since social media is located someplace other than in a workplace. If an employee writes blog entries, for example, however, during work hours on a work computer, then the place of discussion factor could favor an employer. The second factor, the subject matter, probably more often than not will favor an employee because most employee gripes can qualify as part of "an online employee discussion of supervisory activity." The third factor, the nature of an employee's outburst, also will probably favor an employee. Unless an employee makes "verbal or physical threats" when he or she calls a supervisor names, showing that section 7 doesn't protect the epithets may prove difficult. *Am. Med. Response*, Case No. 34-CA-12575, at 10. Finally, the last factor, whether an employer's unfair labor practice provoked an employee's outburst, can, of course, go either way in the social media context because this element requires fact-intensive analysis. Unless two factors tend to favor an employer, a discharge based on derogatory comments about a supervisor made using social media could carry considerable risk.

When an employee makes outrageously phrased comments about the workplace and coworkers respond, the analyses in advisory opinions so far on social media use seem to place an employer between a rock and a hard place. It seems that an employer must either risk facing a complaint to or pursued by the NLRB about an illegal firing, or continue to employ someone who disparages one or

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more supervisors and casts aspersions on a company as a whole. So far, though, social media cases have resulted in advisory memoranda and administrative law judge opinions only. The board, which reviews administrative law judge decisions, has yet to examine or affirm an administrative law judge opinion adverse to an employer. And the U.S. Circuit Courts of Appeals have not yet weighed in on appeals from the board. The board will hear an appeal of an administrative law judge decision, and a U.S. Circuit Court of Appeals will hear an appeal of a board decision. Therefore, the NLRB and the courts still have plenty of opportunity to fashion new law on section 7 protected speech that will take into account the differences between social media and traditional modes of communication.

### Employers Can Fire Employees for Posts About Nonwork-Related Matters

While the NLRA extends broad protections to employees to make potentially offensive comments using social media about their

supervisors and employers, it does not protect employees when they make completely nonwork-related abusive comments. For example, in *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, an employee was terminated for tweeting things such as

- “You stay homicidal, Tucson. See Star Net for the bloody deets.”
  - “What?!?!? No overnight homicide? WTF? You’re slacking Tucson.”
  - “Suggestion for new Tucson-area theme song: Droening [sic] pool’s ‘let the bodies hit the floor.’”
  - “I’d root for daily death if it always happened in close proximity to Gus Balon’s”
- Lee Enterprises*, at 3 (Advice Mem. Apr. 21, 2011).

The advice memorandum stated that the charging party’s “conduct was not protected and not concerted: it did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment.” *Id.* at 6.

Accordingly, a hypothetical employer can still terminate a hypothetical racist employee posting hateful comments on his or her Facebook page. Interestingly, the further removed from the workplace physically or workplace issues an employee’s offensive conduct, the more latitude an employer probably will have to discipline an employee for social media conduct. Employers have a “safe harbor” so to speak when they discharge an employee for nonwork-related inappropriate social media behavior.

### The Chilling Effect of Social Media Policies

Although this article will not explore social media policies in-depth, how to craft them, or the pitfalls of these policies, attorneys will want to know that while employers can terminate employees for inappropriate conduct on social media that is not related to the workplace, excessively broad policies restricting such conduct in general can on their own violate section 8(a)(1) of the NLRA. As noted in the *Am. Medical Rescue* memorandum, “An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Am. Medical Rescue*, Case No. 34-CA-12576, at 11 (internal quotation marks omitted).

One example of a policy that the NLRB

probably would deem too broad and to “chill” section 7 rights would prohibit “[u]se of language or action that is inappropriate...or of a general offensive nature,” or a rule banning “[r]ude or discourteous behavior to a client or coworker.” *Id.* at 12. Therefore, incorporating similar rules into social media policies will cause problems.

Drafting social media policies will require great care, since specific rules prohibiting employees from criticizing supervisors or painting employers in a bad light would restrict—and broad general rules against “rude or discourteous behavior” would chill—section 7 rights.

### Conclusion—Be Specific

Given the advice memorandum and administrative law judges’ opinions, employees now have broad but not limitless social media rights. When terminating or disciplining an employee, if either action has to do with social media an employer must very explicitly explain why. Releasing an employee for disparaging a supervisor online may land a company in hot water if the disparagement has to do with the workplace and especially if other employees comment on the initial posting. However, usually, with the appropriate facts, an employer can terminate an employee for making highly offensive comments of a general, nonwork-related nature.

Furthermore, the NLRB will not always view employee responses to a posting as protected by section 7. In a situation that does not involve a specific call to action, when coworkers fail to respond, this seems to provide a safe haven for an employer to terminate the employee. The more particular to an individual the griping appears, the more isolated to that individual, the more likely an employer can terminate an employee without consequences. If a complaint by an employee does not have anything to do with specific concerns about a workplace, then an employer may still terminate an employee. It appears that employees cannot defame their employers but they can cast them in a bad light if their negative comments have something to do with workplace conditions and in some way implicate coworkers.

Defense attorneys can reasonably hope that the NLRB and the U.S. Circuit Courts of Appeals will clarify the law as time passes and that this will allow them to provide more concrete guidance to their clients. 