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NLRB Finds Facebook Posts Go Too Far for the Act's Protection

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As we reported previously, social media issues are troublesome for employers who must navigate unsettled or even conflicting federal and state laws and decisions. A recent ruling from the **National Labor Relations Board** (NLRB) demonstrates that employers can still protect their business against inappropriate online activity by employees. Specifically, the NLRB ruled that an Employer acted lawfully in rescinding two employees' rehire offers, finding that the Facebook conversations between the two were so egregious as to lose protection under the National Labor Relations Act and render the two individuals unfit for further service with the Employer.

The Employer operates a Teen Center that provides afterschool activities to students. During a period between school sessions, just before the employees would have been rehired for the coming school year, the two individuals engaged in a series of Facebook conversations during which they repeatedly talked, in profane terms, about what they intended to do when they returned to work. The messages contained numerous indications that the two would refuse to follow the rules and policies of the Employer, would refuse to work with management or get required permissions, would engage in various acts to undermine the school's leadership, and they detailed specific acts of intended insubordination.

The NLRB agreed that the exchange of messages (which certainly discussed their displeasure over working conditions) was "protected concerted activity" under the Act. Normally, such protected activity cannot be the basis of any adverse employment action. However, the Board determined that the conduct constituted "pervasive advocacy of insubordination which, on an objective basis, was so egregious as to lose the Act's protection."

In finding the conduct unprotected, the Board relied on the fact that the individuals repeatedly described a wide variety of planned insubordinations in specific detail. According to the Board, these acts were beyond brief comments that might be explained away as a joke or hyperbole divorced from any likelihood of implementation. Rather, the Board concluded that the magnitude and detail of insubordinate conduct advocated in the posts reasonably gave the Employer concern that the two individuals would act on their plans, a risk that a reasonable employer would refuse to take by returning the individuals to the workforce. The Board concluded that the Employer was not required to wait for the employees to follow through on the misconduct they advocated.

This decision gives employers some relief that there are limits to what employees can say on social media, even if the subject of their conversations or postings is "protected" and "concerted". However, before an employer can take adverse employment action against an employee who engages in such activity, the employer must be able to demonstrate that, on an objective basis, the activity is egregious and pervasive and is of such magnitude and of such detail that it is reasonably likely to be acted upon rather than being mere hyperbole.

[Richmond District Neighborhood Center, 361 NLRB No. 74 — October 28, 2014]

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