

Social Media Posts and Concerted Activity

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In the last several months, the **National Labor Relations Board (“NLRB”)** has attracted attention by issuing complaints against employers who disciplined or discharged employees for posting comments on Facebook or other social media criticizing the employer (see [NLRB A 'Twitter Over Employers' Social Media Policies](#), and [Social Media in the Workplace - The Social Media Policy](#)). The NLRB asserted in each case that the employer violated the employee’s right to engage in protected concerted activity and to communicate with other employees about the terms and conditions of employment.

Now, however, in an [Advice Memorandum](#) dated July 7, 2011, the NLRB has emphasized that a key element in finding if an employer engaged in an unfair labor practice **is whether the employee engaged in concerted activity** (in contrast to an employee acting on his or her own).

In the facts underlying this memorandum, the employer discharged the employee for posting comments on Facebook critical to the employer and its customers. The charging party, a former restaurant bartender, had complained to his step-sister on Facebook that he had not received a pay raise in several years and that he was doing the waitresses’ work without receiving any tips. He also called the customers “rednecks” and that he hoped that they choked while driving home.

The Division of Advice directed that the charge should be dismissed because the charging party had not engaged in “concerted” activity. The test for concerted activity is whether the activity is with other employees or on behalf of other employees, and not just by or on behalf of the employee himself or herself. Group complaints or group action also qualifies.

Here, there was no concerted activity. Although the employee posted comments about his conditions of employment, he did not engage in discussions with co-workers about his comments. Additionally, there were no discussions with other employees to take this matter to company management or initiate group action to change the policy. The comments were simply to his step-sister. Thus, **the NLRB concluded that the employer’s decision to discharge the employee (ironically notifying the employee via Facebook) was not an unfair labor practice.**

In short, this recent guidance suggests that the NLRB will be focusing on the element of concerted activity in cases involving social media.

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