Not All Employee Posts Online Are Protected Under the National Labor Relations Act

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Our **December 2010 Employment Law Note** discussed several charges that had been brought by the National Labor Relations Board ("NLRB") against employers for maintaining social media policies the NLRB believed infringed on protected rights. Specifically, under the National Labor Relations Act ("NLRA"), which applies to union and non-union employers alike, employers are prohibited from taking adverse action against employees for engaging in "protected concerted activity," including activities for the "mutual aid or protection" of fellow employees. Generally, the NLRB, the agency that enforces the NLRA, has taken the position that discussions among employees about supervisors and managers, salary, employer policies, or benefits may constitute protected concerted activity. The charges filed by the NLRB confirm that the NLRA protects such concerted employee activity, even if it occurs online. As such, employer policies that impose blanket prohibitions on badmouthing an employer may go too far under the NLRA. However, in three recent advice memoranda the NLRB's General Counsel confirmed that not all employee speech on social media deserves protection under the NLRA.

Bartender's Complaints to Stepsister About Tips—Not Protected. In *JT's Porch Saloon & Eatery Ltd.*, NRLB Div. of Adv. No. 13-CA-46689 (July 7, 2011), a bartender at a suburban Chicago restaurant was annoyed by the restaurant's unwritten tip policy under which all of the bartenders were told when they were hired that waitresses at the restaurant were not required to share their tips with the bartenders, despite the fact that bartenders assisted with food service. Although, the bartender expressed his frustration with a co-worker, saying the policy "sucked," neither employee ever raised the issue with management. Several months later, in a conversation with his stepsister on Facebook, the bartender complained that he had been working for five years without a raise, wasn't getting any tips despite serving food, referred to the restaurant's customers as "rednecks," and said he hoped they choked on glass as they drove home drunk. The restaurant fired the bartender for his posts after the owner saw them on his page.

The NLRB's General Counsel found no protected activity. Although the NLRA protects individual activity if it is the logical outgrowth of concerted activity, the General Counsel noted that the bartender's online complaint was never discussed with other employees and none responded to his posting. Nor did the discussion grow out of the bartender's complaint to his co-worker that occurred months earlier. Instead, his post was simply responding to a question from his stepsister about how his job was going, nothing more.

Employee's Comments That Her Workplace Was "Spooky"—Not Protected. In *Martin House*, NLRB Div. of Adv. No. 34-CA-12950 (July 19, 2011), a recovery specialist at a mental health facility was fired for a conversation she had with a friend on her Facebook page: "Spooky is overnight, third floor, alone in a mental institution, b[y]t[he]w[ay], I[']m not a client, not yet anyway. . . . My dear client ms 1 is cracking up at my post, I don't know if she[']s laughing at me, with me or at her voices, not that it matters, good to laugh." A former client of the facility read the posts and alerted Martin House. As a result, the facility fired the employee for her comments online because they were stigmatizing to patients, not "recovery oriented," violated patient confidentiality, and because the employee had conducted a personal conversation on her Facebook page when she was supposed to be working.

Once again the General Counsel found no protected activity. This time, the General Counsel noted that none of the employee's posts pertained to the terms or conditions of her employment. Moreover, none of the employee's Facebook friends were her co-workers, and the employee never discussed the posts with any of her co-workers. Based on these facts, the General Counsel concluded that the employee's posts were not collective action because they were not made to induce or prepare for group action, nor were they the outgrowth of any collective employee concerns.

Employee's Expletive-Filled Rant About Employer and Supervisor—Not Protected. In *Wal-Mart*, NLRB Div. of Adv. No. 17-CA-25030 (July 19, 2011), an employee, following an interaction with his store's Assistant Manager, posted the following on Facebook: "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!" The employee's Facebook friends were primarily his co-workers. In response to their own comments on his posts, which included a "hang in there" type remark from one of his co-workers, the employee posted: "You have no clue . . . [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that prices . . . that's false advertisement if you don't sell it for that price . . . I'm talking to [Store Manager] about this sh[*]t cuz if it don't change walmart can kiss my royal white a[**]." When a co-worker provided the post to the Store's management, the employee was put on a one-day paid suspension, which precluded him from promotion for twelve months.

Again, the General Counsel found no violation of the NLRA. The General Counsel determined that although the employee's comments were made to a large group of his co-workers, they were nonetheless his own personal and individual gripes. The comments, then, were not designed to induce collective action and none of his co-worker's comments on his posts suggested they took them for anything more than a plea for emotional support. As such, the employee's conduct was not protected.

The Take-Home for Employers. The common theme in each case above is that individual gripes not designed to further collective action are not protected under the NLRA. However, the facts in the cases above are, for the most part, fairly egregious and straightforward. These cases may set the floor, below which employees cannot go if they hope to seek protection under the NLRA. That said, the NLRB has offered little specific guidance on when employee Facebook posts will be protected, though it is clear from the NLRB's earlier charges that it will take action on behalf employees fired over their Facebook postings when collective action is involved. The potential grey area between what is and is not protected under the NLRA may be substantial. As such, until the NLRB provides further guidance, employers should continue to tread carefully before taking action against employees based on their online posts. This is also true for public employers, who are not covered by the NLRA, but are subject to PERC and may face unique First Amendment concerns over such posts.