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Richard D. Alaniz, JD • Jul. 14, 2016

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Most employers prefer that employees not discuss their wages with people they know. They definitely prefer that employees not complain about their pay on Twitter. So when a Chipotle employee at a Haverford, Pa., restaurant did exactly that, the company asked him to delete the posts. Eventually, the company fired the worker. However, earlier this year an administrative law judge with the National Labor Relations Board (“NLRB”) ordered that the employee be rehired and held that the company’s social media policy violated the National Labor Relations Act (“NLRA”).

The situation began when a Chipotle crew member took to Twitter to vent about his job. In January 2015, he tweeted several times to complain about working on snow days. The employee also used Twitter to express his dissatisfaction about crew

members' hourly pay rate of \$8.50. Soon after, a supervisor told the crew member

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In her March ruling, Administrative Law Judge Susan A. Flynn ruled against the company, claiming the employee's rights to tweet were protected under the NLRA. "Having determined that [the employee]'s tweets satisfy both prongs of the analysis—they were protected concerted activity and were for the purpose of mutual aid or protection—I further find that the Respondent's request that [the employee] delete those tweets was unlawful, although no discipline was imposed on him," the ruling noted.

The crew member is among the nearly two-thirds of American adults who use social networking sites, according to the Pew Research Center. As the number of people using social media to vent about problems grows, companies have become more vigilant about monitoring their online reputations. That includes wanting to make sure that their own employees don't mock or insult them on Facebook, Twitter, and other sites. However, in recent years, the NLRB has regularly ruled that employees have the right to complain and even insult their employers online, as long as doing so constitutes "protected activity." When developing policies around how workers can talk about their workplaces on social media, companies must be careful that they don't violate federal laws.

Social Media Policies and the NLRA

While it may seem like a stretch that employees have a legal right to bash their employers on social media, the NLRA protects the right of employees to engage in "protected concerted activities," such as group action to improve wages, benefits, and working conditions, and to engage in union activities and support a union. Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the NLRA

makes it an unfair labor practice for an employer “to interfere with, restrain, or

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The NLRB Faces Criticism

The Chipotle case is just one of many where the NLRB ruled that employees were allowed to criticize their employers online because they were exercising their Section 7 rights. In another high profile case involving a worker at Pier Sixty in New York, the NLRB found that an employee had a right to post a profane rant about his manager and his manager's family on Facebook, since the message involved a bid for unionization, along with a complaint about alleged workplace abuse.

That case began in 2011, when Pier Sixty workers began considering unionizing, in part because they felt they were being treated disrespectfully. Two days before a unionization election in October 2011, an assistant banquet director criticized employees for talking among themselves during an event. One of the workers was upset by the manager's comments and responded by using his mobile phone to post a Facebook message that read: “Bob is such a NASTY MOTHER F***** don't know how to talk to people!!!!!! F*** his mother and his entire f***** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!” The post was visible to the employee's Facebook friends, including 10 of his coworkers.

The day after Pier Sixty employees voted to unionize, the employee deleted his post. About two weeks later, the company fired the employee for violating company policy, based on the Facebook posts.

An NLRB administrative law judge initially sided with the employee. On March 31, 2015, the NLRB affirmed the ruling, voting 2-1 that the worker had been wrongly fired. “Although we do not condone [the employee's] use of obscene and vulgar language in his online statements about his manager, we agree with the judge that the particular facts and circumstances presented in this case weigh in favor of

finding that [the employee's] conduct did not lose the Act's protection," read the

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this majority, along with the Board's appointed General Counsel, have pursued a one-sided agenda at the expense of employers and workers. One particular way the NLRB's majority has transformed the agency is through adopting a wildly expansive reading of the NLRA's protections in order to undermine sensible and widespread workplace policies. Through a series of decisions and official guidance, the NLRB has undertaken a campaign to outlaw heretofore uncontroversial rules found in employee handbooks and in employers' social media policies—rules that employers maintain for a variety of legitimate business reasons.”

The 43-page report lays out numerous cases that demonstrate the “sweeping impact of the NLRB's increasingly biased, and some would say irrational, policy agenda,” according to the Chamber.

Next Steps

With these recent decisions by the NLRB, companies need to be very careful when crafting their social media policies. While companies don't want their own employees destroying the reputation of those who sign their paychecks, in implementing policies employers should try to avoid running into trouble with the NLRB. To achieve that, companies can take several steps:

- Review current social media policies

Companies should look closely at their current social media policies in light of recent NLRB rulings. This should be done in close consultation with in-house counsel, the HR department, and outside counsel who understand the issues at stake. Social media policies should reflect that comments about wages, working conditions, and unions have different protections than other types of complaints.

- Use specific language

The NLRB has raised red flags over many social media policies for being too vague. In

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media posts by employees, they should proceed very carefully with disciplinary actions. It's important to consult with HR and attorneys to ensure that posts aren't protected under the NLRA.

In recent years, the NLRB has reviewed dozens of social media policies. And the agency has often ruled against employers, even when workers have publicly insulted and disparaged their employers online. Companies need to understand the issues involved and working closely with experts in order to make sure their social media policies don't result in regulatory actions.

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