



## **NLRB Signals Retreat on Cases Involving Employee Comments in Social Media**

**August 3, 2011**

**By Jennifer A. Dunn and Doug A. Hass**

In three recent cases, the National Labor Relations Board (NLRB) has indicated that employee comments about their employment on social media web sites like Facebook may not be protected under federal labor law. These cases signal a retreat from the NLRB's trend in late 2010 and early 2011 to issue complaints involving employer discipline of employees who posted complaints about their employment online.

Section 7 of the National Labor Relations Act (NLRA) protects employees who engage in "concerted activity" for their "mutual aid and protection." The NLRB had long held that an employer could restrict public statements by its employees, provided that the purpose of the employer's policy was to maintain a "civil and decent work place" and did not explicitly restrict employees' rights to engage in protected, concerted activity, such as supporting an organizing campaign.

However, with the widespread popularity of social media web sites like Facebook, the NLRB issued several complaints against employers that enforced social media policies and disciplined employees—both union and non-union—who posted online comments about their employment. In February 2011, the NLRB **settled a complaint** that had challenged an employer's policy prohibiting employees from depicting the employer "in any way" on social media sites and prohibited disparaging comments about co-workers or superiors. In May 2011, the NLRB issued a complaint involving the discharge of an employee who made a hostile Facebook posting about a sales event that he believed could impact the earnings of car sales employees. Similarly, in late June 2011, the **NLRB alleged** that a nonprofit organization had illegally fired five employees for posting on an employee's Facebook page negative comments about working conditions and staffing. These cases strongly suggested that the NLRB would treat as protected activity virtually any social media posts by employees.

However, in three recent cases, the NLRB's Division of Advice declined to issue complaints involving employer discipline of employees for their social networking activity, even where their online comments were job-related. In each instance, the NLRB explained that the employee comments did not constitute protected concerted activity, but instead were more appropriately considered personal gripes outside the protection of the NLRA:

- In *JT's Porch Saloon & Eatery, Ltd.*, an employee's online conversation with a relative, stating that he had gone five years without a raise and commenting negatively about his employer's customers, was not protected concerted activity. The NLRB held that the online complaints were never discussed with other employees nor did other employees respond to the posting.
- In *Martin House*, an employee commented during an online conversation on Facebook with non-employees about her work for a mental health service provider, stating that it was "spooky" working at night in a "mental institution." The NLRB found no basis to issue a complaint, finding that the online postings did not mention any terms or conditions of employment, were not discussed with other employees, and received no comments or responses from other employees.



- In *Wal-Mart*, a customer service representative posted disparaging comments about his manager and Wal-Mart on his Facebook page. Although two co-workers responded to his posting, the NLRB concluded that the comments merely expressed the employees' "individual gripes" and did not constitute an effort to induce Wal-Mart employees to engage in group action.

These cases suggest that the NLRB is retreating from its recent overly expansive definition of "protected concerted activity" in the social media context, and that employee social networking activity is not without reasonable limits. These cases serve to reassure employers that while the NLRB has taken an aggressive approach toward overly broad or restrictive social media policies, simple online personal attacks posted outside the workplace are not guaranteed protection under federal labor law.

#### **More Information**

Douglas A. Hass  
dah@franczek.com  
312.786.6502

#### **Related Practices**

Labor & Employment

Copyright © Franczek Radelet P.C. All Rights Reserved. Disclaimer: Attorney Advertising. This is a publication of Franczek Radelet P.C. This publication is intended for general informational purposes only and should not be construed as legal advice