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SOCIAL MEDIA

What to do if Your Boss Doesn't "LIKE" You

While at work one day, Susan Myers comes up to you and says that she is being disciplined by management because of her Facebook posts made while she was on non-work time using her own equipment, i.e., her smartphone. Specifically, she posted the following message on her Facebook page:

"Michelle Willis, a coworker feels that we don't help our clients enough at [the company]. I about had it! My fellow coworkers how do you feel?"

Is she protected from discharge under the National Labor Relations Act (NLRA) for posting this comment?

The answer depends upon whether she engaged in protected, concerted activity. To be engaged in protected, concerted activity, Susan must meet two requirements: (1) she must have been engaged in conduct for the purpose of "mutual aid or protection," i.e., seeking to improve terms and conditions of employment or otherwise improve employees' status, and (2) Susan must have engaged in concerted activity, activity that is engaged in with or on the authority of other employees, and in circumstances where individual employees seek to initiate or to induce or to prepare for group action, and where individual employees bring "truly group complaints" to management's attention. Such Facebook discussions are protected as long as they have some relation to group action in the interest of the employees. Similarly, concerted activity also includes situations where employees discuss shared concerns among themselves before developing any specific plan to engage in group action.

So, looking at Myers' post again, we see that her comments were both concerted and protected. It was concerted because she alerted coworkers that another employee complained about their work, she "about had it" with the complaints, and solicited her coworkers views about this criticism. The comments were protected because the discussion was about their job performance.

Suppose now that Susan, frustrated with her supervisor's mistreatment of the staff, vented her frustration by posting from her smartphone the following message on her personal Facebook page:

"Bob is such a NASTY ——— F——R don't know how to talk to people!!!!!! F— his mother and his entire f—ing family!!!! What a LOSER!!!! Stick with the UNION!!!!!!!"

This post was visible to her Facebook "friends," which included some coworkers, and to others who visited her personal Facebook page. The use of vulgarity is common-place on the shop floor. Is she protected under the NLRA from discipline or discharge because of the post?

The likely answer is yes, depending upon the totality of the circumstances. The following factors should be considered: (1) whether the record contained any evidence of the employer's antiunion hostility; (2) whether the employer provoked Susan's conduct; (3) whether Susan's conduct was impulsive or deliberate; (4) the location of Susan's Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the employer considered language similar to that used by Susan to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Susan was typical of that imposed for similar violations or disproportionate to her alleged offense. In a similar case, the Board found that an objective review of the evidence under the totality of the circumstances established that the post was not so egregious as to put the employee's comments outside the protection of the Act.

Let's look at another scenario. Suppose Susan, a recovery specialist employed at a non-profit residential facility for homeless people with significant mental health issues, while working, made Facebook posts referencing the employer's clients and making comments regarding a straitjacket, popping "meds" and hearing voices. She is not Facebook "friends" with any of her coworkers and none of the commenting "friends" were coworkers. But a former client saw the post and complained to the employer. Would this post be protected, concerted activity?

No. The evidence shows that Susan, in this case, did not discuss her Facebook posts with any of her fellow employees, none of her coworkers responded to the posts, and she was not seeking to induce or prepare for group employee action. The Facebook posts did not even mention any terms or conditions of employment. Susan was merely communicating with her personal friends about what was happening on her shift. So, she was not engaged in activity protected under the NLRA.

Suppose Susan's Facebook post raised a concern about favoritism, she was speaking

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only for herself, and there is no evidence that her coworkers shared her belief that favoritism existed. In that case, her post will likely be considered a "personal gripe," and not protected, concerted activity.

As a general rule, Susan's Facebook posts will be protected even if she made unintentional, or merely negligent false, misleading, or inaccurate statements on her page. But, if she posted maliciously false comments that were made with knowledge of their falsity or reckless disregard for their truth or falsity, the Facebook or other social media posts will most likely lose NLRA protection. Moreover, the Board normally will not find a public statement unprotected unless it is "flagrantly disloyal, wholly incommensurate with any grievances which [employees] might have." To lose the Act's protection, as an act of disloyalty, an employee's public criticism of an employer must evidence a "malicious motive."

Let's go back to Susan

Suppose Susan had only hit the "Like" button in response to an employee comment. Is she protected? Current Board law suggests that a "Like" expresses approval only of the specific post to which the employee posted it. A comment less "Like" does not express approval of earlier responses by others to the same post, because an employee wishing to express approval of any additional comments arising from the initial post would "Like" them individually.

In sum, when using Facebook to "comment" or "like" to take on the boss, several factors should be considered to determine if the employer's disciplinary penalty can survive a review by the Board:

• the posts should concern employees seeking to improve their terms and conditions of employment, call attention to the employer's mistreatment of employees, or, for example, serve as part of a continuing protest against the employer and a call to other employees to support the union;

• the posts should seek to initiate or induce or to prepare employees for group action, or discuss shared concerns before finalizing a plan to engage in group action;

• the posts should not be maliciously false, i.e., made with knowledge of their falsity or reckless disregard for their truth or falsity (as shown above, the employer may not discipline or discharge an employee for unintentional or merely negligent false, misleading or inaccurate statements during the course of protected activity).

• the "Like" button should be used to make "comment less" statements in response to discussions related only to attempts to improve terms and conditions of employment and those seeking to induce union or group action when joining a coworker's work-related discussions.

Also, most UE collective bargaining agreements provide that the employer can only discipline or discharge employees for "just cause." An employee's Facebook or social media posts are not exempt from the "just cause" language in a collective bargaining agreement. In fact, even if the union leadership decides to file a Board charge, if appropriate, a grievance under the "just cause" language should also be filed with the employer.

If one of your members is disciplined over one of their social media posts, as their steward you should handle it like you would handle any other disciplinary action taken by the employer against one of your members. The first thing you need to do is investigate to see if the employer has met the burden of "just cause" in taking disciplinary action, or if the employer has also committed a ULP.

• What was the social media post that got your member disciplined? Whatever form of an employee's communication – either spoken or written - that was protected before the advent of social media, is still protected by the NLRA, including public outbursts against a supervisor using offensive language. However, an employee's communication that violates an employer's privacy policy, or disparages the employer or its products and is "so disloyal, reckless, or maliciously false" as to lose the Act's protections, can result in disciplinary action. Employees in the healthcare field must also be especially careful of not violating patient HIPPA protections in their social media posts

• How did the employer obtain your member's social media post? It is unlawful for an employer to threaten, interrogate, or engage in surveillance of their employees' use of social media, if their employees' communications fall under the protections of the Act. However, if the employer received your member's social media post, unsolicited, from one of your member's "friends," the employer had not engaged in unlawful surveillance. So it's important to find out during your investigation how the employer obtained your member's social media post to determine whether the employer violated the Act.

• Does your employer have a social media policy? And if they do, did the employer ever notify the union about the policy? An employer commits an ULP if it unilaterally adopts a social media policy without properly notifying the union representing the employees covered by the policy and without providing the union an opportunity to bargain over the policy or its effects. In addition, the NLRB has issued a number of complaints against employers whose social media policies were so overly broad "as employees could reasonably construe them to prohibit protected conduct." As you can see, there are a number of ways to attack the employer's social media policy, if they have one.

Social media provides workers with another means of communicating with one and another today. Hundreds of millions of people, including many union members, use Facebook, Twitter, YouTube and other forms of social media. Social media is another tool that workers have in their fight to improve their wages, benefits and working conditions. It's going to be up to unions and stewards to defend their members' right to continue to use social media against the employers' attempts to take it away.

UE Social Media

UE maintains an active presence on the two largest social media platforms, Facebook and Twitter. The national union's Facebook page can be found at ***facebook.com/ueunion*** and the national union's Twitter handle is ***@ueunion***. Both of these are great ways to stay up with the latest UE news.

Many UE locals use their own Facebook pages to share information and promote discussion among members. Just go to ***facebook.com*** and use the Search bar to find what's available. If your local doesn't currently have a Facebook page, setting one up is fairly easy.

Some UE locals also use Facebook *groups* to share information and promote discussion among members. Unlike pages, where all content is public, Facebook groups can be set to "closed" (only members of the Facebook group can see the content) or "secret" (only people who have been invited to the group can find the group itself). While this provides some level of privacy, you should never assume that *anything* posted on social media won't find its way back to the boss.

Although the national union is not on Instagram (a photo-sharing platform), Local 203 and the Workers Union at UNC (a chapter of Local 150) have Instagram accounts, and many UE members share photos of UE activities using the hashtag ***#ueunion***.