

'Absurd Results': NLRB Takes 'Facebook Discipline Cases' To New Heights (Or New Lows, Depending On Your Point Of View)

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In a July 27 opinion that National Labor Relations Board (NLRB) Chairman Philip Miscimarra characterized as "absurd," a majority of NLRB members overturned an employee's discharge for a Facebook post that encouraged a former coworker to sue the company. The case was filed against [Butler Medical Transport, LLC](#), by former employees challenging terminations made pursuant to the company's social media policy. The social media policy at issue provided, "I will refrain from using social networking sights [sic] which could discredit Butler Medical Transport or damages [sic] its image." The board found that policy language to be overbroad and too restricting of employees' rights to discuss terms and conditions of employment online. Thus, it violated the National Labor Relations Act (NLRA). In the decision, the NLRB first analyzed the termination of an employee who participated in a public Facebook exchange with a former employee. The scenario played out this way: When the former employee posted that she believed she had been unjustly terminated by the company, a still-employed worker responded by stating, "Sorry to hear that but if you want you may think about getting a lawyer and taking them to court...[Y]ou could contact the labor board too." The employer fired the employee for those comments. When analyzing the termination, a majority of NLRB members ruled that the discharge violated the NLRA because: 1) the exchange was concerted (*i.e.*, involved group activity) and was made for the mutual aid and protection of workers; and 2) the discharge was made pursuant to an unlawful social media policy. Chairman Miscimarra dissented to this finding in light of his belief that the Facebook comments were not "concerted" (and therefore not protected by the NLRA) and further noted that, in his opinion, the board's approach to these types of cases in recent years has yielded "absurd results." [Miscimarra may soon have majority support](#) for his views, but his lone vote was not enough for now. In addition, the NLRB upheld a separate discharge involving this company in which an employee made maliciously false statements on Facebook about the maintenance of the company's ambulances. Through an investigation, the company was able to prove those comments were not based on any verifiable facts. Chairman Miscimarra agreed with that determination. The NLRB in recent years has upheld at least some discharges related to Facebook activity where the communications at issue have been found to be "maliciously false." For now, employers should consider treading carefully when it comes to discipline for comments on Facebook (or other social media platforms) that deal with workplace issues. The NLRB's views on this issue likely will change to some extent once President Trump's nominees are confirmed, but until then the ever-expanding

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trend we've seen from the agency on this issue seems like it will continue.

