

Outlier...or NLRB Shift On Social Media Policies?

July 7, 2014 | [Social Media And Technology](#), [Labor And Employment](#)



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The National Labor Relations Board has spent the past few years attacking social media policies as overbroad, but perhaps a shift in that policy is at hand. Last week, an NLRB administrative law judge ruled that Bubba Gump Shrimp Co. and its parent company, Landry's Inc., did not violate employees' rights under the National Labor Relations Act with their social media policy. Former Bubba Gump employee Sophia Flores claimed that the Landry's Inc.'s social media policy from its employee handbook had a chilling effect on employees' Section 7 activity by prohibiting employees from discussing their jobs online, and the NLRB's Regional Office agreed and filed a Complaint. The applicable social media policy read in relevant part as follows:

While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.

The ALJ found that the language in question did not inhibit employees from engaging in Section 7 activity. Specifically, he found that the first sentence did not explicitly prohibit employees from posting job-related information about themselves or their coworkers, but instead merely called on employees not to create morale problems. The ALJ continued that the next sentence modified and clarified this requirement by stating that morale problems could be avoided by employees being civil to others in their opinions. As such, the ALJ concluded that Landry's Inc. did not prohibit employees from discussing job-related subjects, but only expected them to do so in a civil manner. The decision is at odds with recent NLRB activity, as the Board has spent recent years subjecting social media policies to intense scrutiny and asserting that policies that even hinted that employees should not discuss work-related issues in social media posts had a chilling effect on employees' Section 7 rights. It is unclear at this time whether the *Landry's Inc.* case marks a shift in the NLRB's approach or is an outlier. However, employers should watch future NLRB activity on the subject, as the Board might be moving toward a more pro-employer stance. The case is *Landry's Inc. v. Flores*, case number 32-CA-118213 before the National Labor Relations Board.

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