

## Breaking News: Employees Are Still Posting Inappropriate Content On Facebook. So Let's Just Learn From Their Lack Of Judgment

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A Texas veterinarian recently posted a horrific image of herself on Facebook holding a cat killed by an arrow through its head. Along with the image (too graphic to include here), the employee posted the following: "My first bow kill lol. The only good feral tomcat is one with an arrow through it's (sic) head! Vet of the year award... gladly accepted. "And no I did not lose my job. Pssh. Like someone would get rid of me. I'm awesome." Well, she was wrong. This "awesome" employee's horrified employer fired her. Why is this story worth mentioning on the Currents blog? Because the Facebook post represents a clear example of social media activity that falls outside the scope of the National Labor Relations Act (NLRA). As many employers are aware, the NLRA provides protection to employees engaging in social media activity when the content amounts to "protected concerted activity." This occurs when two or more employees take action for their mutual aid or protection regarding the terms and conditions of employment (e.g., wages, hours, safety, etc.). Analyzing whether a post amounts to "protected concerted activity" can be a difficult process. As a result, we believe it is best to work through the analysis with examples. On one end of the spectrum you may have a Facebook post between employees engaging in a civil discussion regarding workplace safety. This discussion would arguably constitute protected concerted activity. On the other end of the spectrum you may encounter a post like the horrifying example discussed above – arguably **not** protected concerted activity. Along the spectrum you may encounter various other examples:

1. "We don't get paid enough to work overtime for that d@mn jerk!"
2. "Good thing OSHA isn't around because my dumb boss doesn't care about safety."
3. "Our best customer, Mr. Smith, is a jerk."
4. "The boss is too old to run the company."
5. "I am going to beat up my supervisor and key his car."

Examples 1 and 2 arguably constitute "protected concerted activity." Examples 3-5 arguably do not. Remember: the farther the post strays from the "terms and conditions of employment," the more likely discipline will be permissible. Of course the analysis is much more complex than this. Many other factors could come into play. As such, it is always prudent to involve outside counsel when evaluating whether an employee should be disciplined for a social media post.

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