BARNES & THORNBURG LLP

Employee Fired For Facebook Selfie

October 19, 2015 | Social Media And Technology,Labor And Employment

A Georgia employee was recently terminated from his position at a marketing firm as a result of a disgraceful Facebook "selfie." In this case, the employee took a "selfie" with a co-worker's African American son and uploaded the image as his profile picture. The employee's picture resulted in a number of Facebook "friends" making derogatory, racist, and disgraceful remarks about the child (we won't be posting them here). In response to some of the remarks, the employee described the child as "feral." Not surprisingly, the company promptly terminated the employee's employment. Why is this story worth mentioning on the Currents blog? Because this Facebook post represents yet another 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 some 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 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.

RELATED PRACTICE AREAS

Internet and Technology
Labor and Employment
Workplace Culture 2.0

RELATED TOPICS

Facebook
National Labor Relations Board (NLRB)
Protected Concerted Activity