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NLRB Offers Further Clarification Regarding Expression Of Employees' Section 7 Rights On Social Media

May 23, 2013 | | Social Media And Technology,Labor And Employment

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Social media password screen

On May 8, the National Labor Relations Board (NLRB) issued an advice memorandum that further clarified its position regarding employees' use of social media to make cybergripes pursuant to their Section 7 Rights.

In *In re: Tasker Healthcare Group, d/b/a/ Skinsmart Dermatology*, no. 04-CA-094222, Charging Party and a group of nine other current and former employees participated in a private Facebook group message. While the discussion started off as purely social, the tone changed when Charging Party referenced with disapproval a former employee who was returning to the employer. Charging Party posted a string of expletives about the employer, stating that the employer was "full of s***" and the employer should "F***ING FIRE ME …Make my day…" One of Charging Party's coworkers who was part of the group message showed the message string to the employer and the employer terminated Charging Party's employment, stating that it was "obvious" she no longer wished to work there.

The NLRB determined that the messages were not a protected concerted activity and upheld the termination because the message string contained no shared employee concerns over their terms and conditions of employment. While the NLRB has found that concerted activity is protected where employees express concerns prior to developing a group action, "mere griping" without any thought of forward action is not protected. In this scenario, Charging Party did not express any shared concerns about working conditions, and no forward plan was discussed. Charging Party merely expressed an individual gripe about a returning coworker. There was no evidence that any of her coworkers saw her postings as an expression of shared concerns about work conditions.

In a contrasting April, 2013 decision, the NLRB ordered Bettie Page Clothing to reinstate with back pay three employees it had terminated for complaining about company procedures on Facebook. The three employees engaged in a discussion on Facebook about how they were dissatisfied that the store would not close earlier in the evenings when neighboring stores closed, feeling that their safety was compromised by remaining open later. The NLRB determined that the three employees were engaging in activity protected by Section 7 because they were collectively discussing their working conditions. Therefore, the NLRB determined that the employer engaged in an unfair labor practice by terminating the employees for engaging in protected activity.

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A comparison of these two decisions helps to clarify the NLRB's stance regarding social media complaints and protected activity. Employers should understand that employees' legitimate complaints about work conditions are protected, and they may not discipline employees for such complaints, even if they are overly critical or ultimately are not well founded. However, employers also should understand that not every critical word an employee writes online is protected, and that employees do not have an unfettered right to express individual gripes that are unrelated to work conditions.