# Recent Developments in NLRB Law on Employee Usage of Social Media

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# SOCIAL NETWORKING IN THE WORKPLACE

***What Follows are the Personal Thoughts and Opinions of Ambrose V. McCall Regarding Social Networking in the Workplace and does not constitute legal advice and does not represent the Opinions of Hinshaw & Culbertson LLP.***


## Recent Developments in NLRB law on Employee Usage of Social Media

Since 2012, the Courts and National Labor Relations Board have applied principles first set forth in 2012 by the NLRB's General Counsel in agency memoranda. NLRB Office of Gen. Counsel, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum Om 12-59 (May 30, 2012); NLRB Office of Gen. Counsel, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum Om 12-31 (Jan. 24, 2012); NLRB Office of Gen. Counsel, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum Om 11-74 (Aug. 18, 2011). According to the law, the later analyzed and discussed advice memorandum issued by the General Counsel do not qualify as legal precedent that is binding on either the National Labor Relations Board agency, or the federal courts. *Midwest Television, Inc.*, 343 NLRB 748, 762, n. 21 (2004). The influence of the General Counsel's memos on social media, however, has been very significant.

The NLRB has formulated a nine-factor test to assess whether certain actions by employers, including their workplace rules, may or may not impinge on the employees' statutory right to undertake concerted action to not only unionize, but to also discuss terms and conditions that related to their workplace. For example, the NLRB and federal

courts use the following discussed test and apply it to assess whether an employee's social media communications are protected by law or tip over into unprotected egregious conduct. *Richmond Dist. Neighborhood Ctr.*, 361 NLRB No. 74, 2014 WL 5465462, at *2, n. 6 (Oct. 28, 2014)(explaining that the issue of whether a private Facebook conversation was egregious would be evaluated under the totality-of-circumstances test since no exceptions to the test applied).

The referenced totality of the circumstances test is used to assess whether an employee's use of social media is protected under the National Labor Relations Act, including the rights of employees to self-organize to "form, join, or assist" unions and "bargain collectively" and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…" 29 U.S.C. §157. The same Act also confers protections on employees by categorizing acts by covered employers that interfere with employee rights granted by the Act, or that discriminate against persons who exercise such rights in hiring or their employment as unfair labor practices. 29 U.S.C. §158(a)(1),(3).

The nine part test weighs various factors including:

(1) evidence of antiunion hostility;
(2) whether the conduct complained of by the employer was provoked;
(3) whether the conduct complained of by the employer was impulsive or deliberate;
(4) the location of the conduct at issue;
(5) the subject matter of the conduct at issue;
(6) the nature of the content at issue;

(7) whether the employer considered similar content to be offensive;
(8) whether the employer had a specific rule that prohibits the content at issue; and
(9) whether the discipline imposed on the employee was typical for similar violations or proportionate to the offense.

*NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123, n. 38 (2nd Cir. 2017).*

In *Pier Sixty, LLC*, the court first noted that the terminated employee, during a workplace break, had posted a Facebook message that strongly supported voting for the union in a workplace election, but which also referred to a management supervisor, and that person's mother, with swear words used in a personal manner. *Id*. at 118. The posting was available to ten co-workers of the terminated employee, and when management learned of the posting, it led to the posting employee's termination. *Id*. The court proceeded to find that the subject matter of the message concerned workplace concerns, including how management treated employees and the election over union representation. *Id*. at 124. Moreover, according to the court, there was evidence of antiunion hostility based on alleged threats to rescind benefits and/or to discharge employees who voted to organize. In addition, there was testimony that employees were directed to not discuss the union through a workplace rule that was enforced. As a result, the court found workplace tension. In addition, the record indicated that the use of profanity by employees was accepted by management, including severe curse words, expletives, and even racial slurs. *Id*. As a result, the court found that the discharge of the complaining employee two days before the union election, for using swear words in his Facebook post, and where no other employee had

been similarly terminated or even apparently disciplined, created a context subjection to question. *Id*. at 125. The Facebook post was not in the immediate presence of customers and was taken down 3 days later after the posting employee learned that the public could access his post. Id. Nevertheless, upon applying the above described nine factor test, and describing the discharged employee's conduct as sitting "at the outer-bounds of protective, union-related comments", *id*. at 118, the court affirmed the Board's findings that the employer violated 29 U.S.C. §158(a)(1),(3) by discharging the employee because the conduct was not so "opprobrious" or egregious that it was disqualified from receiving the protections provided by the National Labor Relations Act. *Id*. at 126. Therefore, the fired employee was received the relief that the NLRB sought to enforce on his behalf. *Id*. at 118, n. 5. This outcome, however, is not limited to situations where social media is used in an offensive manner by employees.

In workplaces undergoing strikes and stressful protests related to an employer's use of replacement workers, the courts have granted employees some protections for using racially offensive language that would normally provide grounds for immediate termination in other contexts. See *Cooper Tire & Rubber Co. v. NLRB*., 866 F.3d 885, 891-92 (8th Cir. 2017)(stressing that reinstated striker did not exhibit "any threatening behavior or physical acts of intimidation" and that alleged remarks did not create "a hostile work environment" so that employer's Title VII obligations "did not conflict" with reinstating striking employee under the National Labor Relations Act).

What social media provides to an employee is a tool that may create evidence of protected concerted action by the employee, and permits the NLRB to find that a posting was viewed or supported by

other employees. *Novelis v. NLRB*, 885 F.3d 100, 108 (2nd Cir. 2018). In *Novelis*, there was an administrative finding that eleven co-employees had "liked" or commented on the demoted employee's Facebook post that both complained about his salary and severely criticized co-workers who voted against the union while using vulgar remarks. *Id*. at 103-04, n.1, & 108. The court explained that such speech qualifies as protected activity if it is made with the goal of getting other employees to undertake work related group action. *Id*. at 108 ("An employee's speech is 'concerted' if 'it is engaged in with the object of initiating or inducing group action.'"). Moreover, the demoted employee had made screenshots of the Facebook post to aid his testimony regarding the nature of his speech and the reaction of his co-employees. *Id*. Finally, the court underscored that since the employer learned of the Facebook posting by it being brought to its attention by another employee allowed attributing knowledge to the employer that other employees could see the demoted employee's Facebook post. *Id*. Such evidence and findings by the Board allowed the court to affirm the administrative agency's findings that the employer had committed an unfair labor practices by demoting the employee who posted the Facebook comment on both his salary and the union election, among other actions by the employer. *Id*.