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—ATTORNEYS AT LAW—

A Follow-Up on "What to Do When Your Employee Trashes Your Company on Social Media." A Cautionary Tale or Two.

05/09/18

One of your employees posts on social media that you are a “nasty mother F—er don’t know how to talk to people!!!!!! F—k his mother and his entire f—ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!” Your reaction would be to terminate the employee, right? Not so fast… As an employer, you must closely examine the content of the employee’s post to determine whether it meets the test to be considered protected “concerted activity“ under the National Labor Relations Act (NLRA). The National Labor Relations Board (Board) has established the following factors for this review:

1. Whether the employer has a record of anti-union hostility;
2. Whether the employer provoked the employee’s conduct;
3. Whether the conduct was impulsive or deliberate;
4. The location of the offending social media post;
5. The subject matter of the post;
6. The nature of the post;
7. Whether the employer considered the language offensive;
8. Whether the employer maintained a specific rule prohibiting the language at issue; and
9. Whether the discipline was typical of that imposed for similar violations.

In the real-life situation outlined above, the Board found that the working environment of the employer was permeated with hostile and offensive language that the company regularly tolerated. The Board therefore concluded that none of the test factors weighed in favor of finding the posted comments so egregious as to lose the NLRA’s protections. As a result the employee could not be fired because of his remarks.

In another social media situation, an employee who entered into a settlement agreement with his former employer, signed an agreement that contained a confidentiality provision as follows: “the plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement . . . [a] breach . . . [w]ill result in the disgorgement of Plaintiffs portion of the settlement Payments.“ After the agreement was executed by all parties, the daughter of the employee/plaintiff wrote on her Facebook page “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” The social media posting was a clear violation of the agreement and Gulliver was not required to pay the proceeds to the Plaintiffs.

TAKEAWAY: When encountering such a post, it is important to think before you act!

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