

Employees' Social Media Activity: Proceed with Caution

By Emily A. Crow

June 2017

Given the prevalence of social media in our online culture, employers are forced to navigate the ever-changing landscape of issues presented by the social media usage of their employees.

What recourse does an employer have when an employee posts on his or her social media platforms about the workplace? What if the employee's post attacks an employer's practices or even personally attacks his or her supervisor?

The National Labor Relations Board ("NLRB") gives context to these questions, and, as with most legal and compliance issues, the answer is "it depends." On April 21, 2017, the Second Circuit issued its decision in *NLRB v. Pier Sixty, LLC*¹ which restricts employers' ability to take action based on disparaging social media posts by employees.

In *Pier Sixty*, the Second Circuit considered, in part, whether to enforce the NLRB decision that an employee's comments on Facebook about management, which were made during work hours, constituted "protected concerted activity" and were not so outrageous to remove the employee's protections under the National Labor Relations Act ("NLRA").

Section 7 of the NLRA protects an employee's right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The NLRA further prohibits an employer from firing an employee engaged in such activities. The employee can lose these protections if his or her behavior is deemed abusive or "opprobrious."

The *Pier Sixty* employee's Facebook stated as follows:

Bob is a NASTY MOTHER F*ER don't know how to talk to people!!!!!! F*** his mother and his entire f***king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!**

The post was publicly accessible. The employee removed the post three days later, but management had already learned of the post. After conducting an investigation, the employer terminated the employee. The employee filed an NLRB charge alleging retaliation for engaging in protected concerted activity.

The Court applied the NLRB's nine-factor "totality of the circumstances test" to evaluate whether the employee's social media posting was protected by the NLRA. The test includes such factors as, among others, the subject matter of the conduct, whether the employer considered similar conduct offensive, and the location of the conduct.

¹ *NLRB v. Pier Sixty, LLC*, No. 15-1841 (2d Cir. Apr. 21, 2017).

Ultimately, the Court held that the employee's Facebook posting constituted protected concerted activity and that, therefore, the employee was protected from discipline based on that posting under the NLRA. The Court based its holding on the following considerations:

- > The posting included statements about union activity (the postings were made days before the employees voted to unionize);
- > While the posting did contain significant profanity, use of profanity was common in the employer's workplace, and the employer consistently tolerated profanity in the workplace and had never terminated an employee for such conduct before; and
- > The posting was not deemed a "public outburst" under the facts presented.

The Court did note, however, that this employee's Facebook postings were "vulgar," "inappropriate" and "sit[] at the outer-bounds of protected, union-related comments."

TAKE-AWAYS

- > Ensure social media and communications policies comply with current law and the NLRB's current guidance on social media;
- > Seek legal counsel to review policies as the policies must be narrowly drawn to avoid interference with employees' rights under the NLRA; and
- > Proceed with extreme caution and seek legal counsel before disciplining an employee for conduct on social media or online, particularly in cases where the employee's conduct or statement relates to terms and conditions of employment or union-related activities.

If you would like more information, please contact:

[Emily A. Crow](#) in Mobile at (251) 345-8222 or **ecrow@burr.com**
or the Burr & Forman attorney with whom you regularly work.

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