ALAS, SOMETIMES AN EMPLOYEE CAN BE FIRED FOR DISPARAGING HER EMPLOYER ON FACEBOOK

When an employee uses social media to bad-mouth her employer, **is it considered expressing a personal gripe – or engaging in protected, "concerted activity"**? Over the past few years, the National Labor Relations Board (NLRB) has adopted a broad view on what constitutes concerted activity, and has considered it a potential violation of the National Labor Relations Act (NLRA) to fire an employee for disparaging his or her employer on Facebook. As many of our clients know, the NLRA applies to both unionized and non-unionized companies, so businesses have been extra cautious about taking action against an employee based on social media posts – and rightfully so.

On May 16, 2013, the NLRB finally provided employers with a glimpse of hope on this issue, issuing an advice memorandum acknowledging that **sometimes employee postings are nothing more than individual rants and are not protected under the NLRA as concerted activity**. The NLRB specifically addressed the situation of a medical office employee who posted to her colleagues in a Facebook message group that the company was "full of sh-t," that the company was scared of her, and that if she were fired, it would "make her day." No other employees in the message group participated in her rant. Instead, another employee shared the message string with the company, after which the company terminated the employee on the grounds that she was clearly no longer interested in working for the company. The company further articulated that, given the employee's strong feelings, it was concerned about having the employee interact with patients.

After filing her charge with the NLRB claiming that she was fired for exercising her right to engage in protected, concerted activity, the Advice Division of the NLRB concluded that the employee's comments were nothing more than an expression of her own personal gripes about her own situation at work, and amounted to mere boasting about how she was not afraid to say what she wanted at work. The NLRB determined the employee's claim should be dismissed.

It is important to remember, however, that earlier NLRB cases have broadly defined "protected, concerted activity" as expressions or intent to induce group action, or group complaints about common working conditions. For instance, in the 2012 case of *Hoodview Vending Co.* (359 N.L.R.B. No. 36), the NLRB said that conversations about wages, work schedules and job security were so "inherently concerted" that they did not require a group discussion to be considered protected. With that in mind, employers should be wary of reading too much into the recent advice memorandum. In the 2013 case discussed above, the employee's postings were solely related to her individual work situation and no

other employees joined in her discussion.

When all is said and done, there is still no bright line on the issue, but we now know the NLRB recognizes there is at least *some* line employees cannot cross. **Employers often are quick to conclude the line has been crossed when an employee says anything negative about the company. Before taking any action against an employee on that basis, employers should consult with knowledgeable legal counsel.**

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