

BUSINESS LAW 101 RESEARCH PAPER

**SOCIAL NETWORK POSTINGS VS. EMPLOYMENT DISCIPLINE AND  
TERMINATION**

**I. Introduction**

Today's digital age provides more opportunities than ever to connect with friends and family as well to express our thoughts, ideas and feelings. For most people, work comprises a significant portion of our lives, up to and sometimes more than a third of our weekday hours, and at times can be a source of frustration. When we feel this frustration from our work lives, we naturally want to relieve that frustration by sharing it with our loved ones. Facebook and other social networking sites can provide this outlet quickly, easily and effectively. However, what happens if your supervisor or someone else at your employer sees these remarks? Could you be written up, otherwise disciplined or even fired?

Employment discipline and termination regarding social networking is a developing area of the common law which has not been definitively defined to date. However, the constitutional guarantee of freedom of speech through the first amendment and the National Labor Relations Act governing employee rights and collective bargaining may help to answer the above questions in the future. As the following explains, these statutory provisions support the notion employees should *not* be punished or fired because of postings made on social networking sites such as Facebook on their own time.

## II. FREE SPEECH ARGUMENTS

Employees of the federal, state and local governments enjoy a tradition of having their speech protected by the first amendment and the courts. However, in order for this speech to be protected, they must adhere to certain parameters. In general, the statements must be made in the employee's capacity as a citizen and not in his or her official capacity as a public employee.

In the case of Foley v. Town of Randolph, #09-1558, 2010 U.S. App. Lexis 5020 (1<sup>st</sup> Circ.), the court affirmed a fire chief's suspension related to statements he made at a fire because he was not speaking as a citizen when criticizing the fire department. In the case of Sousa v. Roque, 578 F.3d 164 (2009), the court held an employee's speech regarding his employment conditions were not addressing a public concern matter. However, in City of Detroit v. DPOA (Bennett), 732 N.W.2d 164 (2006), the Court decided an officer's termination for maintaining a website criticizing the police chief violated his right to free speech. His website was maintained as a private citizen and the subject was a matter of public concern.

Several other cases have addressed the question of public concern topics triggering a public employee's free speech protection as related to employment as well as other restrictions about the types of statements protected. In Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996), the United States Supreme Court ruled the first amendment protected an independent contractor from having his contract with the government to haul trash terminated or not automatically renewed because he criticized the county's landfill use. The Supreme Court in Garcetti v. Ceballos, No. 04-473 (2006) refused to use the first amendment to

protect a public employee from retaliation in the form of adverse “employment actions” because the employee’s statements were made as part of his official duties as a deputy.

Several cases address the types of statements which are not protected by the first amendment in general and as it relates to employment. In Fayette County, Arkansas, a local newspaper article described a \$10,000 settlement made between the Brownsville Area School District and one of its teachers. Someone other than the teacher posted pictures of the teacher on Facebook with a stripper and as a result, the teacher was suspended for thirty days without pay. This case provides support for employees being exempt from discipline related to their conduct on social networking sites regarding off-the-clock personal matters.

An employee will not be protected from adverse employment decisions regarding social networking postings if the postings are found to constitute defamation. An article in Labor and Employment Law entitled, “Digital Age Defamation”, explains defaming an employer on the internet is akin to “slandering it on the evening news, or out front of its building”. However, this does not necessarily mean employees can never make any negative remarks on Facebook or other social networking sites. According to the article, “Anniston City Council Tables Facebook Policy”, published in the *Anniston Star*, the local city council decided not to definitively decide if a policy essentially mandating employees “either say something nice or not say any at all about their place of employment while online” violated the first amendment.

Employees will also not be protected by obscene material. As laid out in Miller v. California, 413 U.S. 15; 93 S. Ct. 2607 (1973), content will be deemed obscene if 1) a reasonable person would think it violates current obscenity standards; 2) if the whole

piece “appeals to the prurient (arousing or obsessive) interest in sex”; 3) if it contains “patently offensive sexual conduct”; and 4) if it has no other literary, artistic, political or scientific value.

The common law to arise to date regarding the issue of free speech and employment action focuses only on public employees. However, because private employees can be fired, written up, suspended or otherwise disciplined the same as public employees, they should be afforded the same protections. The government has not hesitated to protect private employees of protected classes from discrimination in the workplace and it should not hesitate to protect private employees’ free speech guarantees either.

## **II. NATIONAL LABOR RELATIONS ACT ARGUMENTS**

The National Labor Relations Board (NLRB) enforced the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. The NLRA allows employees “to work together to improve terms and conditions of employment” in concert with a union or on their own. To qualify for protection, two or more employees must discuss these employment issues. Unlike the cases discussed above, the NLRA protections focus on the private sector and specifically exclude government employees.

NLRA’s “collective bargaining” protection was affirmed in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In this case, the Court ruled employees enjoy “a fundamental right to organize...for collective bargaining, and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation”. In 2010, the NLRB applied its authority to enforce the NLRA provisions regarding collective bargaining and discussing work-related issues to

Facebook and social networking sites when it filed a lawsuit on behalf of an employee. The NLRB's Hartford office sued an ambulance company because it terminated an employee for posting negative comments about her supervisor on Facebook. It also alleged the ambulance company "maintained and enforced an overly broad blogging and internet posting policy" by prohibiting employees from making "disparaging remarks" or discussing the company at all on without permission. The NLRB charged the employee's postings were a "protected concerted activity" because others commented on them and the employee commented back, qualifying it as a discussion about work conditions. Unfortunately, we will have to wait for resolution of this issue; in February, 2011, the case was settled. The employee at issue received an "undisclosed settlement amount" though she did not get her job back. Also as part of the settlement, the ambulance company agreed to change their policies to avoid violating employees' rights to discuss work-related issues.

Finally, in 2010, the NLRB issued an advice memo to provide guidance to employers as well as hint at the type of speech and social networking cases it might take on in the future. The memo addressed a specific situation in which health care workers were suspended because they made negative remarks about patient care and safety on Facebook. Because the postings showed the employees' "disregard for patient safety and compassion", the NLRB found the employer had not violated the NLRA and was right to discipline the employees. As evidence of the company's right to discipline these employees, the NLRB pointed out the company did not discipline an employee for posting comments about raises on MySpace in 2006. In the memo, the NLBR advised an employer could violate the NLRA if it disciplines employees because

of their social network postings but that there would be no violation if the postings do not constitute discussions of pay or other working conditions or union activity.

### **III. Conclusion**

The free speech protections afforded to public employees should extend to those working in the private sector and; therefore, employees should be able to post on Facebook and other social networking sites freely without fear of discipline by their employers provided the activity takes place on personal time and does not constitute defamation or violate obscenity standards. Even if social networking postings would not be deemed protected by the first amendment for public and private employees, employees should be insulated from discipline from such activity by the NLRA. As long as the statements flow between two or more individuals to meet the definition of discussion, address pay or other working conditions, and do not violate basic public policy issues like patient health and safety, the postings made on social networking sites should be protected as efforts to improve working conditions with or without a union as protected by the NLRA. Even though these arguments have not been endorsed by any court of law to date, it is certain Facebook and other social networking sites will not go away so our court system should be preparing to answer this debate one way or the other.

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