



## Best Practices in Social Media for Employers Part 3 – Disciplining Employees for Conduct on Social Media

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When reviewing the facts and determining whether an employee has been wrongfully disciplined or terminated for violating an employer's social media policy, the Board uses the following standards:

1. Was the employee's conduct or activity concerted?
2. Did the employee's conduct or activity seek to benefit other employees?
3. Was the employee's conduct or activity carried out in a way that caused it to lose protection?

*Was the employee's conduct or activity concerted?* Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.

*Did the employee's conduct or activity seek to benefit other employees?* For this prong of the review, the Board will determine whether the employee sought improvements with respect to terms of employment, such as in pay, work hours, workload and/or treatment by superiors, which would benefit more than just the employee who engaged in the conduct or activity. If the employee's action is more along the lines of a personal gripe, then the conduct should not be protected under the NLRA.

With respect to the above two questions, employers should be aware that an employee's conduct or activity on social media would likely be found to be concerted and for the

benefit of other employees if the employee's co-workers participate in the online conversation. For example, if an employee writes a social media post about an allegedly unfair supervisor (even if the employee's post starts out as a personal gripe about the employee's interactions with that supervisor), and the employee's co-workers subsequently comment on the post, or even just "like" it, then this fact alone is likely to be enough for the Board to find that the employees were engaged in concerted activity and seeking to benefit others.

If the above two questions are answered in the affirmative, then it is likely the NLRB will find that disciplining or terminating an employee for their online activity was a violation of the NLRA. However, the Board would then consider the final prong:

*Was the employee's conduct or activity carried out in a way that caused it to lose protection?* The Board has held that reckless or malicious behavior, such as sabotaging an employer's equipment, threatening violence, spreading lies about an employer's product or revealing trade secrets, can cause an employee's concerted activity to lose its protection. Using the above example again, if, after the employee wrote a post about the allegedly unfair supervisor, the employee then threatened physical harm to that supervisor, the employee's conduct would likely lose protection under the NLRA and the employee could be disciplined or terminated for his or her conduct.

In light of the above, we recommend employers carefully evaluate employees' conduct on social media sites as it pertains to the particular facts and circumstances of each of these standards prior to making any disciplinary decisions. Moreover, often the conduct of the employee at issue is in violation of a company policy that is separate from that which occurs on social media and which might provide a more appropriate basis for discipline without the same risks.

## Categories

Social Media

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