What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

Employers Beware: NLRB Expands Scope of Protected Concerted Activity

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As previously reported, in September of 2021, the General Counsel for the National Labor Relations Board (NLRB) issued memoranda directing regional offices to pursue an expanded array of remedies against employers in unfair labor practice cases. During the Obama administration, the NLRB aimed at employment policies prohibiting employees' use of private employers' equipment, including work emails and IT resources, as well as specific policies requiring employee confidentiality in workplace investigations. The basis for this emphasis was the NLRB's position that such policies unduly restrict activities protected under Section 7 of the National Labor Relations Act, which prohibits employment practices and policies that unduly infringe upon employees' statutory right to discuss terms and conditions of their employment. This expanded reach continues under the Biden administration and applies to what the NLRB perceives as unfair labor practices by private employers, regardless of whether or not they have a unionized workforce.

Before and particularly during the pandemic, employers have placed greater emphasis on virtual tools and platforms for communicating with team members. Social media has taken the place of the water cooler chats many of us previously utilized to connect with our colleagues. In the virtual world, gifs, memes, emojis, and emoticons often take the place of the written text in conveying and sharing our likes and dislikes.

It is within that context that on January 31, 2022, the NLRB issued an advice memorandum ("advice memo") regarding whether an employee's social media posting that included a meme and prompted a colleague to respond with an emoji constituted Section 7 protected concerted activity. And, if so, whether the posting employee's subsequent termination violated the NLRB's prohibition against retaliating against workers for such action. The advice memo answered "yes" to both inquiries and directed the NLRB to issue a complaint against the employer in the event the dispute is not settled.

Background details

The NLRB issued the advice memo in response to a charge against a Georgia surgical

practice. Before the Charging Party's employment termination, she discussed concerns about a colleague's management style with other employees. The Charging Party had complained to management about her heavy workload. That night, the Charging Party posted the following on Facebook: "Just in case someone needed to know," accompanied by a shrugging emoticon. The post then incorporated a meme stating: "*A bad manager can take a good staff and destroy it, causing the best employees to flee and the remainder to lose all motivation."* The Charging Party concluded her post with, *"Employees don't leave companies; they leave managers."*

Multiple people commented on the post, including two of the Charging Party's coworkers. One colleague responded, *"YESS. Freakin YESSSSS!!"* Another colleague posted only an emoticon of a face with no mouth. After that, a supervising representative of the surgical practice sent one of the responding colleagues a text stating that *"someone just sent me a screenshot of your comment you made on [the Charging Party's] Facebook posting about managers. Just a heads up."* The responding colleague texted a screenshot of the supervisor's text they had received to the Charging Party. The two employees then exchanged a series of texts discussing their shared belief that a manager's conduct had led the third colleague who had responded to the post with only an emoji to look for new employment.

The next day, a separate supervisory representative of the surgical practice met with the Charging Party's colleague who had commented in response to the post and asked him if he was happy at work. He warned the colleague to be careful with their online posts to avoid getting into trouble. Later that day, the surgical practice claimed the Charging Party had been the subject of eleven patient complaints within the prior month and terminated the Charging Party's employment. In response to the charge, the surgical practice did not produce any supporting documentation regarding the alleged patient complaints or any evidence of prior verbal discipline of the Charging Party.

Application of Relevant Statute

Under Section 7 of the National Labor Relations Act, the protected concerted activity includes:

- Statements by employees addressing their coworkers to initiate, induce, or prepare for group action;
- A single employee's communications with management to convey a group complaint;
- Statements made to elicit group action from like-minded colleagues for a personally held view about working conditions; and
- Communications involving "inherently concerted" discussions about vital aspects of workplace life.

The NLRB's advice memo concluded that the Charging Party's Facebook post constituted protected concerted activity as the Charging Party had made it to initiate, induce, or prepare for group action over the quality of employees' supervision and resulting attrition, which are topics of concern for all employees of the surgical practice. This advice memo reflects the NLRB's first foray into the use of gifs, emojis, and emoticons in

its evaluation of whether such non-text activities render the communication a protected concerted activity.

Evaluation of Employee Communications as Inherently Concerted Activity

The NLRB further surmised that the Charging Party's Facebook post discussed job security, thus rendering it "inherently" concerted activity. Such activity occurs when the person initiating the communication implies a desire to induce group action by discussing (1) higher wages, (2) changes in work schedule, or (3) job security. The advice memo went a step further to recommend that "discussions about quality of supervision" be added to the NLRB's list of inherently concerted activities.

Finally, the advice memo opined that even if the Facebook post did not rise to the level of protected concerted activity, the surgical practice's discharge of the Charging Party constituted a preemptive termination in violation of the National Labor Relations Act to "chill or curtail potential future Section 7 activity." The surgical practice – by terminating the Charging Party after issuing threats to the Charging Party's responding colleague through a "heads up" text message and a follow-up verbal warning to be careful what he posted – evidenced its clear intent to "erect a dam at the source of supply" of future protected concerted activity.

Key Takeaways

Advice memoranda issued by the NLRB do not establish a binding precedent. However, such memoranda do provide valuable insights into the NLRB's thought process in reviewing charges that may come before it. For that reason, private employers should review their employment policies, practices, and procedures to ensure that they do not unduly restrict employees' communications with one another about the terms and conditions of their employment on social media or in any other context. Before disciplining an employee for a work-related social media post, employers would be well advised to evaluate whether the post constitutes protected concerted activity.

If you have questions regarding this agency guidance or other legal issues on the employment relationship, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541