Employees' Legal Rights to Talk About Work on Social Media

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Union members – and all employees – have the right under federal law to discuss their working conditions, pay or benefits with fellow employees, whether those discussions are in-person, by phone, or on social media. **In short: your members do have the right to use Facebook, X (Twitter), TikTok, or other social media to discuss with their co-workers any topics involving their working conditions, pay or benefits, even though the employer might say otherwise.** This right is protected by the National Labor Relations Board (NLRB). It is unlawful for an employer to discharge employees, write employees up, or otherwise discipline employees – or even warn employees – for exercising their right to discuss such topics with fellow employees, on Facebook or elsewhere. It is also unlawful for an employer to have a policy that is contrary to this right.

But beware. There are some limitations on this right that everyone should understand. Some communications on social media are not protected by federal law, even when they are connected to the workplace. Here are five things to keep in mind when advising members on their rights to talk about the workplace on social media:

First, the communication may not simply be an individual "gripe." It must be designed either to rally other employees to join together to address a workplace issue or to seek advice or assistance from other employees or the Union on dealing with a workplace issue. Consider the following hypothetical Facebook postings, *none* of which would be protected under actual NLRB decisions:

NOT PROTECTED; EMPLOYEES CAN BE DISCIPLINED FOR POSTS LIKE THESE:

1. "What's with all these rednecks who come to Universal Studios (the employer)?"

2. "F--- Universal!"

3. "I hate Universal Studios and everyone who works there! I wish people would just leave me alone!"

4. "My co-worker is sucking on his teeth. It's so annoying!"

5. "The next person who speaks to me as if I am somehow their servant, dumps an unlabeled cardboard box of files in my office, or directs me to do something that isn't my goddamn job (have we heard of asking?) is going to wish very heartily that they had not."

None of these statements 1-5 above would be protected by federal law because they are nothing more than individual complaints or "venting" **unless** there is other evidence to show that the statement occurred in the context of group concerns about terms or conditions of employment (2 can be a group – i.e. concerted) or was related to a joint or union appeal to the employer concerning terms or conditions of employment. Standing alone, none of the above statements directly seek advice or assistance from other employees about dealing with workplace issues. Accordingly, in all these examples just listed, Universal Studios could *lawfully* discipline the employee who posted, **although that does *not* automatically mean that Universal could discharge or otherwise *harshly* discipline an employee under a CBA's "just cause" provision – that depends on the particular facts.**

In contrast, consider these hypothetical postings, also based on actual NLRB decisions, which ***would*** likely be protected by federal law *and* by a CBA's just cause provision:

PROTECTED: AN EMPLOYER *CANNOT* LAWFULLY DISCIPLINE EMPLOYEES FOR POSTS LIKE THESE:

6. [First Employee's Facebook Status]: "Joe Smith, supervisor, thinks we don't work hard enough at Universal Studios. I about had it! Fellow coworkers, how do employees feel?"

> [Second Employee's Responsive Comment]: "What the f… Trying to do my job."
>
> [Third Employee's Responsive Comment]: "What the hell? We don't have a life as is. What else can we do???"
>
> [Fourth Employee's Responsive Comment]: "Tell him to come do my f---ing job!"

7. "I'm tired of our safety concerns not being taken seriously. Universal needs to do something to protect us!"

8. "Today was a bad day. My coworker got fired because she asked for help and I got yelled at for caring."

9. "I can't believe Sue got promoted to assistant lead and not me! She doesn't do any work. Universal doesn't know how to tell people they do a good job and I'm done being a good employee. Who else is done with Universal's favoritism?"

10. "[In response to a Facebook discussion about "drama" at work and a coworker being unfairly disciplined]: It's our supervisor who causes all the drama!"

11. [Alongside picture from a public area at the theme park or CityWalk]: "Hanging out at the Morgue. We are sent here to sit around for three hours for no reason."

Unlike the examples in Nos. 1-5 above, these comments 6-11 actually raise concerns about specific workplace issues and – at least implicitly – seek assistance or input from fellow employees. The NLRB has held that the posting employee's statement, or some other context, must show that help or input from other employees is being sought. But this showing need not be direct or explicit in the message – it can be made indirectly or implicitly by looking at the message or some background facts, and still thereby achieve legal protection against discipline or the threat of discipline. Note, however, that no. 9 above is not smart: if the posting employee is later accused of not doing his or her job properly, it could be evidence that he or she has stopped trying, and the post could be evidence to support discipline for job performance problems, even though the employee can't be disciplined for the post itself. And no. 11 above should probably not be posted while actually on the clock because it could be evidence to support discipline for neglecting work duties. So, members should be careful even when exercising their legal rights.

Second, and related, the communication must be "concerted," meaning that it must be intended to reach fellow employees of the Company or intended to reach the Union (which, after all, is a collective of all our members working together), either to seek advice or assistance or to initiate group action to address a group workplace problem**. If employees post a comment about a workplace issue on Facebook, but they are not "friends" with any of their co-workers or the Union, then the communication cannot be considered "concerted" and would not be protected.** A textbook example of a concerted, protected comment would end, like Example No. 5 above, with a statement such as "Fellow coworkers, how do employees feel?" or "Fellow coworkers, we must do something about this mistreatment!" Such a statement helps to achieve legal protection, but again, the employee's concerted intent may be inferred or implied if necessary to still achieve legal protection.

Third, the communication must be about working conditions, pay or benefits. These are "protected" topics, meaning employees can discuss them. They include many things – wages, benefits, insurance, pensions, hours, work assignments, vacation approval, scheduling, discipline, workplace policies, supervisors, etc. Working conditions can also include other problems caused by an employer that affect our members' ability to do their jobs – for example, the closing of roads or parking lots to accommodate at the workplace.

Fourth, the communication should not disparage the employer's products or services, especially to people outside the Company. Public criticism of the quality of the employer's products or services when that criticism does not relate to working conditions is not protected by federal law. This is because employers are entitled to expect that their employees will cast their services or products in a positive light when communicating with potential customers and the public. Although your Facebook posts may only be accessible to your "friends," Facebook and other social media are considered public forums since most people have many "friends" who are not coworkers. Even if the other requirements are satisfied, bashing the employer's services or products can deprive employees of legal protection and get employees disciplined.

Finally, the communication must not be excessively vulgar or profane and it must not appeal to bigotry or prejudice or threaten violence (or even the possibility of it). The mere use of curse words is not enough to strip an otherwise permissible statement of the protection of federal law. In fact, the NLRB understands that in the real world, people don't always use the most polite language. Nevertheless, our members should always be careful about the way they say things on social media, recognizing that individuals other than their Facebook "friends" and Twitter "followers" are likely to see what they post and that their "friends" on Facebook are not necessarily restricted to only their friends in real life. Excessive profanity, particularly when directed at a specific individual (e.g., "So-and-so is a f---ing b----!"), may cause a statement to lose the protection of federal law. Threats of, or references to, violence, even vague or joking, or the use of stereotypes or ethnic slurs will almost certainly remove any protection that an online comment would otherwise have. Republican NLRB members frequently affect faux outrage at worker profanity when they, themselves, might routinely use profanity in the workplace.

But remember – just because federal law might not protect certain speech does NOT mean that an employer can get away with firing someone or imposing other harsh discipline for any particular social media posting. An employer typically cannot discipline even vulgar, profane, or disparaging union-related statements if the employer's primary motivation for doing so is to punish concerted speech or activity, rather than to punish vulgar or disparaging speech. As noted, with a Republican administration, this might change for the worse for us. And we have a collective bargaining agreement that requires Universal to prove "just cause" for any discipline. "Just cause" under our contract is a case-by-case analysis – even speech unprotected by federal law might not provide just cause for discharge, and if it provides just cause for any discipline, the punishment must fit the crime.

Lastly: you can file a ULP charge to get rid of employee handbooks or employer policies that would reasonably be read by employees to prohibit exercise of their rights to engage in protected, concerted speech or activity on Facebook or other social media. This is particularly true when the employer has no strong justification for the rule. The most common example of illegal policies are employer rules against discussing pay rates. Talk to your Union if you think Universal has a policy that might restrict your right to engage in protected, concerted speech.

Social media is a powerful tool for connecting us with other people – and to discuss and take action on important issues in our own lives and in the world around us. Our members have the right to use this tool to improve their working conditions, pay and benefits as long as they do so carefully and intelligently. The watchword is: Be informed but don't be afraid!

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