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NLRB Continues to "Like" Enforcement over Social Media Policies and Related Issues

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In recent years, the National Labor Relations Board (NLRB) has focused attention on company policies that attempt to limit employee engagement in social media. Specifically, the NLRB has consistently taken the position that social media policies that deter employees from speaking out about workplace conditions or other issues in the workplace do not comply with Sections 7 and 8 of the National Labor Relations Act (Act), which generally guarantee the right to engage in protected concerted activity for the mutual aid or protection of employees without reprisal.

Beyond the policies themselves, the NLRB has scrutinized actions taken by employers in response to employee actions on social media. On August 18, 2016, the NLRB issued its decision in *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, in which it provided further clarification on what constitutes protected concerted activity under the Act. 364 NLRB No. 72 (Aug. 18, 2016). In *Chipotle*, a disgruntled employee had tweeted three times, touching on some employment-related issues. The company learned about the tweets and presented the employee with the social media policy, asking the employee to remove the tweets. The employee agreed. Later, the employee was terminated after circulating an unrelated petition regarding employee breaks.

The Union filed a Charge, asserting that Chipotle's policy violated Section 8(a)(1) of the Act because the policy's prohibitions against "disparaging, false, [or] misleading" statements could reasonably be construed to include speech protected by Section 7; that Chipotle had violated Section 8(a)(1) of the Act by directing the employee to delete the tweets; and that Chipotle had violated Section 8(a)(1) of the Act for terminating the employee after circulating a petition. The NLRB agreed with the administrative law judge (ALJ) that Chipotle had violated Section 8(a)(1) by maintaining an overbroad policy that can be reasonably construed as prohibiting protected concerted activity, but reversed the ALJ's finding that Chipotle had violated the Act when it directed the employee to delete the tweets. The parties had not disputed that the tweets were protected (i.e. that they were directed at the terms and conditions of employment), but Chipotle disputed that they were concerted, or for the purpose of "mutual aid or protection." The ALJ concluded that the tweets *were* concerted, even though the employee did not "consult or discuss with other employees any intention to post these tweets," nor was there any evidence that any other employees had seen the tweets, tweeted back or otherwise engaged on the basis of the tweets. The NLRB concluded that this was an insufficient evidentiary basis to find the tweets were concerted as defined by the Act, and thus, Chipotle's actions in directing the tweets be removed did not violate the Act.

And perhaps to provide a bit of holiday cheer to employers, another recent case again highlights the NLRB's willingness to go after conduct aimed at employee engagement in social media – this time by a union. In *Laborers' Union Local No. 91*, the Charging Party union member, Frank Mantell, asserted that the Union had violated Section 8(b)(1)(A) of the Act by removing him from the out-of-work list pursuant to charges brought against Mantell for comments he made about the Union on a Facebook post. No. 03–CB–163940 (Sep. 7, 2016). Mantell had engaged in a discussion in a Facebook group wherein he criticized Local 91's leadership. Local 91's leadership then filed internal charges against Mantell, contending that the comments had damaged the leadership's ability to run the local. The executive board found that Mantell was guilty and fined him $5,000 and suspended him for 24 months. Mantell was removed from the out-of-work list. Mantell appealed to the

International Union, which dismissed the charges. Mantell filed his NLRB charge prior to the International's dismissal.

The General Counsel argued that Mantell's removal from the out-of-work list was a violation of Section 8(b)(1)(A) of the Act, which prohibits a labor organization from restraining or coercing employees in the exercise of rights guaranteed by Section 7. The ALJ agreed, finding that Mantell's Facebook posts were protected, and in that they discussed the receipt of a journeyman's book by someone outside the Union, which could impact Mantell's ability to receive work. Thus, the Union had violated the Act by improperly depriving Mantell of employment opportunities and unlawfully interfering with Mantell's relationship with prospective employers.[1]

Employers must be wary of the traps appurtenant to social media in the workplace – while many employers have taken steps to revise social media policies to reflect these realities, these NLRB cases highlight the Board's willingness to go after employers and unions alike over actual or theoretical restraint of Section 7 activity. Employers should revisit their social media policies given the expanding body of NLRB case law on these issues. And with respect to employee discipline, these cases provide some additional guidance. As seen in *Chipotle*, an employee's isolated tweets or Facebook comments, without involvement from other employees, are unlikely to be considered protected concerted activity under the Act. Notwithstanding that argument, employers still must be proactive in addressing these policy-related concerns in policy materials and with management before problems arise, as a Board finding of unlawful discharge may expose an employer to substantial amounts of backpay.

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[1] Both the Union and the General Counsel accepted to some portions of the ALJ's decision, but the NLRB has not yet issued its decision.