

New Facebook Cases - No Protected Concerted Activity, But Is It Surveillance??

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Facebook cases continue to be examined by the NLRB as a new technology cloaked in traditional case law. The NLRB's General Counsel has recently decided to dismiss three complaints brought by terminated employees who were fired for their Facebook posts. In all three cases, the GC found the conduct not to be protected concerted activity under Section 7 of the NLRA. That approach is consistent with the GC's memo earlier this year which emphasized that content and context were key in analyzing whether disciplinary action brought as a result of social media chatter violated the NLRA. A recent blog post on the topic appears [here](#). To access the GC's office memoranda on these cases, click [here](#). All three continue to show the NLRB's focus on whether the Facebook chatter is merely an expression of individual gripes or is the chatter an effort to initiate group dialogue or group action. Employers must continue to evaluate decisions to discipline for social media postings within that context.

However, buried in one of the opinions, *Intermountain Specialized Abuse Treatment Center*, is a provocative and concerning analysis by the GC's office regarding union surveillance. The Advice Memorandum concludes that it agrees with the Regional Director that the Employer did not unlawfully create the impression that it was engaged in surveillance of protected union activity by having knowledge of the Facebook post. What?? The memorandum states that employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights. Here, there was no such impression of surveillance because the employer received the Facebook information from another employee and the conduct at issue turned out not to be protected activity. However, the memorandum certainly raises the question of whether an employer practice to examine Facebook posts on a regular or even on an as needed basis would violate Section 7 rights. The jury is still out on that issue. Stay tuned.

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