



## Burrito Bowls, Guacamole, & . . . Tweets? NLRB Judge Finds Social Media Policy Unlawful

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There's more bad news this week for restaurant chain Chipotle Mexican Grill, but this time it has nothing to do with the food. Last year, we heard about an NLRB [decision](#) upholding an administrative law judge's (ALJ) finding that the restaurant had committed an unfair labor practice. According to the decision, Chipotle had allegedly threatened and interrogated employees who engaged in discussions about their pay.

The employee at issue in the case had worked at a Chipotle restaurant in St. Louis, Missouri. He was also a union member who participated in strikes and was involved with the "Show Me 15" campaign for a higher minimum wage. That decision is currently pending appeal, and Chipotle has suffered another NLRB loss this week. An ALJ ruled against the restaurant and found an unfair labor practice charge for what the judge described as the company's unlawful social media code of conduct. The case involves a Chipotle employee in Havertown, Pennsylvania, named James Kennedy.

By way of background, Chipotle employs a national social media strategist who is responsible for reviewing employees' social media posts to determine whether any of them violate the company's social media policy. In early 2015, some of Kennedy's tweets were reviewed by the strategist, including one where Kennedy had replied to a few customers' tweets. For example, in response to a customer who tweeted "**Free chipotle is the best thanks,**" Kennedy tweeted "**nothing is free, only cheap #labor. Crew members only make \$8.50hr how much is that steak bowl really?**" Then, replying to a tweet posted by another customer about guacamole, Kennedy wrote "**it's extra not like #Qdoba, enjoy the extra \$2.**"

Chipotle's social media strategist emailed the regional manager, forwarded

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the tweets, and told the manager to ask Kennedy to delete the tweets and to review the company's social media policy with him. Kennedy was subsequently terminated following a dispute with management over an unrelated issue. The ALJ evaluated whether Chipotle maintained an unlawful social media policy based on the following provisions:

- If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information.
- You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors.

Generally a violation of the act based on an unlawful work rule is dependent upon a showing of one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004).

The ALJ found that the company's social media policy failed on the first and third prongs. Picking apart the provision, the ALJ relied on other Board decisions which found rules prohibiting "derogatory" statements to be unlawful. The ALJ also took issue with the prohibition on "false" statements, saying, "[M]ore than a false or misleading statement by the employee is required; it must be shown that the employee had a malicious motive." The ALJ also found no relief based on the policy's disclaimer which said "This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights."

Although the employee was not ultimately terminated for posting the tweets, employers can still get in trouble with the NLRB where social media policies are concerned. Considering NLRB decisions regarding work rules and handbook policies apply regardless of whether the employees are unionized. We'll follow this case as it makes its way to the full Board.